Supreme Court, U.S.
FILED

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No. 97-___

In The

Supreme Court of the United States

October Term, 1996

IN RE: THE HONORABLE ROBERT C. FLANAGAN,

Petitioner,

v.

JUDICIAL REVIEW COUNCIL,
STATE OF CONNECTICUT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of the State of Connecticut violated *In Re: Ruffalo*, 390 U.S. 544 (1967), and the due process rights of a judge in violation of the Fourteenth Amendment of the United States Constitution when it decided his case on grounds not charged, not decided below, not briefed, and not argued, in which he initially was charged by a court reporter with coerced sexual relations, he testified and was believed by the Review Council that this sexual relationship was consensual, private, and limited to his house, and after he so testified, the Review Council then charged him pursuant to a statute with *willfully* violating Canons 1 and 2A of the Code of Judicial Conduct which consensual, private relationship he admitted, but denied that conduct was a *willful* violation of Canons 1 and 2A, and the Review Council, despite knowing that two years prior thereto a proposed amendment to Canons 1 and 2A to include personal conduct, in addition to official conduct, was rejected by the judges, nevertheless found him guilty of *willfully* violating Canons 1 and 2A, and both the judge and the review council agreed that willfulness was the gravamen of his appeal, both of them briefed and orally argued the willfulness issue, and the Connecticut Supreme Court, with no notice to the judge whatsoever, and despite the judge never having been charged with a non-willful violation of Canons 1 or 2A, entered judgment that a non-willful violation of the Canons was sufficient to prove a willful violation of the Canons when it held:

QUESTION PRESENTED – Continued

To require that a judge subjectively have known that his conduct was in violation of the canons of judicial conduct makes it extremely difficult, if not impossible, to discipline a judge pursuant to C.G.S. § 51-i(a)(2) for violating those canons . . . Consequently, the first judge to engage in a given conduct that lessens public confidence in the integrity and impartiality of the judiciary would not be subject to discipline because he would not have been on specific notice that his conduct was prohibited, and he therefore could not be said to have intended to violate the canons. Thereafter, only those judges who engage in the precise conduct of the first judge would be on notice and subject to discipline under § 51-51i(a)(2). We decline to adopt such an unworkable interpretation of § 51-51i(a)(2).

PARTIES

The Petitioner is as follows: Judge Robert C. Flanagan.

The Petitioner was a defendant in both the probable cause hearing before the Judicial Review Council of the State of Connecticut (hereinafter "Review Council") where he was charged with forcing a court reporter to engage in coerced sexual relations with her, and he was the defendant in the formal hearing in which he was charged, based upon his own testimony, with engaging in a consensual sexual relationship with that court reporter for willful violations of Canons 1 and 2A of the Judicial Conduct, both actions prosecuted and decided by the Review Council below, and Flanagan was the appellant in the Supreme Court of the State of Connecticut.

The Respondent is the Judicial Review Council of the State of Connecticut. The Respondent prosecuted and decided the case in both the probable cause hearing and the formal hearing below, and was the Respondent on Appeal in the Supreme Court of the State of Connecticut.

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PETITION FOR WRIT OF CERTIORARI

Robert C. Flanagan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on March 18, 1997 [App. 1 - App. 43], rehearing denied April 24, 1997 [App. 58] in order to resolve important federal questions concerning the fundamental Fourteenth Amendment right to procedural due process which mandates fair notice of the charge to a defendant before he may be found guilty the Connecticut Supreme Court, suo moto, without notice to Flanagan, changed the charge and entered judgment which judgment conflicts with the relevant decisions of this court as there was no notice of the new charge whatsoever given to Flanagan, who first learned that the Connecticut Supreme Court by its judgment on March 18, 1997, subsequent to briefs being filed and the oral argument having taken place, when he read the Supreme Court of the State of Connecticut opinion, he then learned that the willful violation charge lodged against him was changed by the Connecticut Supreme Court to permit a non-willful violation of the Canons to prove a willful violation of the Canons. *In Re: Ruffalo*, 390 U.S. 544, 550-551; *In Re: Oliver*, 333 U.S. 257, 273 and *Selling v. Radford*, 243 U.S. 46, 51.

DECISIONS BELOW

Judge Flanagan was charged by a court reporter who alleged he repeatedly forced her to engage in a coerced sexual relationship with him [App. 8], and after Judge

Flanagan testified, "The review council did not find probable cause that Ross' relationship with Flanagan had been coerced in any way . . . the review council's rejection of Ross' coercion charges finds overwhelming support in the record in that Ross' written complaint and oral testimony were inconsistent and not credible . . . finally, Flanagan, himself, admitted that he had had a sexual relationship with Ross for almost four years but testified that it had been entirely consensual." [App. 9].

Subsequent to Flanagan's testimony that his relationship was a consensual, private sexual relationship, the Review Council then charged him with a willful violation of Canon 1 and with a willful violation of Canon 2A of the Code of Judicial Conduct, and Section 51-51i(a)(2), which statute states:

" . . . a judge shall be subject to censure, suspension or removal from office for . . . (2) *wilful violation of . . . any canon of judicial ethics, . . .* " [Emphasis added] [App. 79] so that the only formal charges against Flanagan were the allegations of a willful violation of Canon 1 and Canon 2A, until the allegations were changed as reflected by the judgment of the Supreme Court of the State of Connecticut, and although Flanagan admitted engaging in that consensual sexual relationship, but denied that constituted a *willful* violation of Canons 1 and 2A [App. 82]. The Connecticut Supreme Court found non-willful violations of Canons 1 and 2A were a willful violation of C.G.S. 51i(a)(2).

C.G.S. § 51-51(l)(a) requires a complainant to maintain confidentiality before the proceedings have terminated. The court reporter was warned by the chairperson

of the Review Council not to make any statements concerning the case. She willfully disobeyed it, and gave statements to the local newspaper media, radio and television media. Flanagan's motion to dismiss for breach of that statute was denied on the grounds that Flanagan could not prove that the violation impacted on the fairness of the Council's deliberations, and, because Flanagan admitted the consensual sexual relationship with the court reporter, and filed a motion in limine to prohibit any testimony whatsoever concerning forced sexual relations, which, despite Flanagan's admission of the consensual relationship, the motion in limine was denied, the court reporter was, again, despite being disbelieved as to coerced sexual relations, permitted at the subsequent public hearing to again testify as to her disbelieved lurid coerced sexual allegation, it is patent that the Review Council so feared the media that the fairness of the deliberations evaporated and the Review Council found the judge guilty of willful violations of Canons 1 and 2A which decision was so unfair that even the Supreme Court of the State of Connecticut, in order to sustain the conviction, for the first time, without notice to Flanagan, entered judgment that a non-willful violation of Canons 1 and 2A satisfy a conviction of a willful violation of Canons 1 and 2A [App. 43].

The Review Council is composed of three judges, three lawyers and six lay members [App. 28] and, as hereinafter set forth, two of the three judges and one of the three lawyers found the judge not guilty of the willful violations of Canons 1 and 2A, and the remainder found him guilty [App. 78]. The dissent [App. 76 - App. 77] cogently addresses the willfulness issue and the fact that

personal conduct is not covered by the Code of Judicial Conduct. Judge Flanagan appealed [App. 56] setting forth in issues One and Three that there was no "wilful violation of Canons 1 and 2A of the Code of Judicial Conduct in violation of C.G.S. § 51-51(i)(a)(2) and, the Review Council, in its counter statement of the issues, judicially admits the wilfulness issue is paramount where it stated, "3. Could the Council have reasonably determined that the Respondent Judge had 'wilfully' violated Canons 1 and 2A of the Judicial Conduct." [App. 57]. Both Judge Flanagan and the Review Council briefed the willful violation of the Canons issue, both orally argued before the Supreme Court of the State of Connecticut.

Flanagan appealed primarily on the issue that the consensual relationship particularly when the judges had, two years prior thereto, rejected a proposed amendment to include personal conduct in the Code of Judicial Conduct, that he was guilty of a willful violation of Canons 1 and 2A.

His appeal set forth that he was not guilty of a willful violation of the Canons, the Review Council's counter statement of the issues specifically stated that Judge Flanagan was guilty of willfully violating the Canons, both the Council and Flanagan briefed the willful issue, both the Council and Flanagan argued the willfulness issue, and, the first time Flanagan found that a non-willful violation of Canons 1 and 2A could be a willful violation of Canons 1 and 2A was when the Supreme Court of the State of Connecticut entered its judgment so stated. That appeal was timely taken, as was a motion for reargument which was denied on April 24, 1997 by the Supreme Court of Connecticut.

Judge Flanagan, in violation of *In re: Ruffalo*, 390 U.S. 544, 550, first had notice that he was charged with non-willful conduct when the judgment of the Supreme Court of the State of Connecticut with no notice to him of its decision charged him with that non-willful violation and found him guilty of that non-willful violation, when it reasoned:

> Consequently, the first judge to engage in a given conduct that lessens public confidence in the integrity and impartiality of the judiciary would not be subject to discipline because he would not have been on specific notice that his conduct was prohibited, and he therefore could not be said to have intended to violate the Canons. Thereafter, only those judges who engage in the precise conduct of the first judge would be on notice and subject to discipline under § 51-51i(a)(2). We decline to adopt such an unworkable interpretation of § 51-51i(a)(2).

On March 27, 1997, the Petitioner here, defendant below, moved the Supreme Court of the State of Connecticut for reargument [App. 44 - App. 55] which was denied on April 24, 1997 [App. 58].

JURISDICTION

Pursuant to Supreme Court Rule 13.1, this petition has been filed within the specified time period of his denial of his motion for reargument, and this court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment XIV, § 1 in pertinent part states:

> " . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Connecticut General Statutes § 51-51i, in pertinent part, reads: "(a) . . . a judge shall be subject, in a manner and under the procedures provided in this chapter to censure . . . (2) *wilful violation of . . . any canon of judicial ethics.*" [Emphasis added].

STATEMENT OF THE CASE

In this case, the Supreme Court of the State of Connecticut has "affirmed" the judgment of the Review Council in which it found Flanagan guilty of a willful violation of Canon 1 and guilty of a willful violation of Canon 2A of the Code of Judicial Conduct in violation of C.G.S. § 51-51i(a)(2). The error committed by the Supreme Court of the State of Connecticut (Conn.Sup.Ct.) is that it attempted to overrule *In re: Ruffalo*, 390 U.S. 544, 550 which holds, "He is accordingly entitled to procedural due process, which includes fair notice of the charge." As hereinafter set forth, the entire case below, both hearings before the Review Council, the statement of issues on

appeal by both the Review Council and Flanagan, and both Flanagan's and the Review Council's briefs and oral argument in the Conn. Sup. Ct. focused on the willfulness issue, and it was only when the Conn. Sup. Ct. filed its opinion three months after oral argument that Flanagan, indeed the rest of the state, learned for the first time that the charge was effectively changed from a *willful* violation of Canons 1 and 2A to a non-willful violation of those Canons. At that time, Flanagan had no opportunity whatsoever to respond to those non-charged allegations, which the Supreme Court attempts to justify when it stated at page 184 [App. 34]:

> Consequently, the first judge to engage in a given conduct that lessens public confidence in the integrity and impartiality of the judiciary would not be subject to discipline because he would not have been on specific notice that his conduct was prohibited, and he therefore could not be said to have intended to violate the canons. Thereafter, only those judges who engage in the precise conduct of the first judge would be on notice and subject to discipline under § 51-51i(a)(2). We decline to adopt such an unworkable interpretation of § 51-51i(a)(2).

Therefore, the Conn. Sup. Ct. *admits* that it has decided this case under a non-willful charge, and has called it a willful charge. The flaw in that thinking is that *In re: Ruffalo, supra,* prohibits such a violation of due process.

On November 13, 1995, a court reporter filed a complaint with the Review Council alleging that Flanagan had caused her repeatedly to engage in coerced sexual relations with him. The Review Council, under Connecticut procedure, prosecutes, through its executive director,

the case before the Review Council. The court reporter testified as to her coerced sexual relations allegations, to which Judge Flanagan testified that he had had a consensual, private sexual relationship with the court reporter in his home and the Review Council dismissed her allegations: "The Review Council's rejection of Ross' coercion charges finds overwhelming support in the record in that Ross' written complaint and oral testimony were inconsistent and *not credible*." [App. 9]. [Emphasis added].

Subsequent to his testimony before the Review Council, Flanagan was charged with a willful violation of Canons 1 and 2A in violation of C.G.S. § 51-51i(a)(2). In his answer to those two charges, Flanagan admitted the consensual sexual relationship, but denied that it constituted a willful violation of either Canon 1 or Canon 2A. [App. 82].

Because of the inordinate publicity, and because it was supposed to have been a confidential hearing, but the court reporter violated the confidentiality statute despite express orders from the chairperson not to divulge any information, Flanagan filed a motion to dismiss [App. 68 - App. 73]. However, the Review Council denied the motion to dismiss.

Flanagan, because he had admitted that he had been engaged in a consensual sexual relationship with the court reporter, filed a motion in limine to prohibit the disbelieved coerced sexual allegation testimony. [App. 74]. There was no objection to the motion in limine, but nevertheless the chairperson of the Review Council denied the motion.

During the public hearing, despite the Review Council having totally disbelieved her, and despite the Judge not being charged with coerced sexual relations, the motion to dismiss being denied, and the motion in limine being denied, the court reporter was permitted to again voice her untruths. In addition, the Review Council called as a witness the public defender who testified to a consensual sexual relationship with the same court reporter. In response to a question on cross-examination, he admitted that the court reporter accused him during the time that she had a consensual relationship with Judge Flanagan, of fathering her aborted child [App. 75].

The Review Council well knew that on April 30, 1991, the "Proposed New Code of Judicial Conduct" was submitted to the judges of the Superior Court and, as it affects this case, the *proposed and rejected* amendment read:

> The prohibition against behaving with impropriety or the appearance of impropriety applies both to the professional *and personal* conduct of a judge [Emphasis added]. [App. 63].

That clearly indicates that personal conduct of a judge was not within the scope of Canon 1 or 2A. The amendment was not adopted, rather it was rejected, and as shown on the Code of Judicial Conduct effective March 16, 1993, personal conduct in the instant situation is not any violation of the Code, much less a willful violation of the Canons pursuant to C.G.S.§ 51-51i(a)(2). One must wonder how the express rejection of personal conduct warned Flanagan that a private, consensual sexual relationship was prohibited.

Despite the above infirmities, the Review Council found Flanagan guilty of a willful violation of Canon 1 in violation of § 51-51i(a)(2), and found him guilty of a willful violation of Canon 2A in violation of § 51-51i(a)(2) by a vote of nine to three. Two of the three judges on the Council voted not guilty as to each Canon and one of the three lawyers on the Council voted not guilty [App. 78] and filed a dissent [App. 76 - App. 77].

Flanagan timely appealed the decision of the Review Council and emphasized in the Issues on Appeal, Issues One and Three, that there was insufficient evidence to find him guilty of a willful violation of Canons 1 and 2A of the Code in violation of C.G.S. § 51-51i(a)(2) which willful issue is judicially admitted by the Review Council as the only charge that applies to Flanagan when it stated in its Counter Statement Issue No. Three. [App. 57].

Flanagan then filed his initial brief focusing on the "willful" issue, and the Review Council timely filed its answer brief equally focusing on the "willful issue." The willful issue was orally argued before the Conn. Sup. Ct. in December of 1996, and, when the Conn. Sup. Ct. issued its judgment on March 18, 1997, without any notice to Flanagan that it effectively changed the charge from a willful violation of Canons 1 and 2A when it held that a willful violation of the Canons can be proven by non-willful violations despite neither Flanagan nor the Review Council ever having been made aware of any non-willful charges [App. 1 - App. 43]. Flanagan filed a motion to reargue on March 27, 1997, asserting the *In re: Ruffalo, supra,* lack of due process for failure of notice and

opportunity to defend, [App. 44 - App. 55], denied without comment on April 24, 1997, [App. 58]. This petition is timely filed.

REASONS FOR GRANTING THE WRIT

The judgment of the Supreme Court of the State of Connecticut has so emasculated the case of *In re: Ruffalo*, 390 U.S. 544 (1967), as its judgment violates the Fourteenth Amendment to the Constitution of the United States, because of a complete lack of due process afforded Judge Flanagan as he received *no notice* whatsoever of the charges upon which the Supreme Court of Connecticut entered judgment against him. His first notice of the changed charges was when he read the opinion of the Supreme Court of the State of Connecticut. The charges lodged against Judge Flanagan always alleged a *willful* violation of Canon 1 and a *willful* violation of Canon 2A in violation of C.G.S. § 51-51i(a)(2).

The matter commenced with the filing of the complaint by the court reporter which alleged "willful" violations of the Canons, the charges against him at the hearings below always alleged "willful" violations of Canons 1 and 2A, his written answer to the complaint addressed the "willful" issue, he defended himself against the "willful" charges by testifying that the relationship was a private, consensual sexual relationship below, all of the testimony below focused on the "willful" violation of Canons 1 and 2A, the Review Council found him guilty of a willful violation of Canon 1 and a willful violation of Canon 2A, he appealed asserting there was

no willful violation of Canon 1 and 2A, the Review Council judicially admitted that a willful violation of the Canons was the standard upon which it charged him, it briefed that issue accordingly, both the Review Council and Flanagan orally argued the willful issue before the Connecticut Supreme Court, and then, with no notice whatsoever, subsequent to any chance that Judge Flanagan had to defend himself, the Connecticut Supreme Court "affirmed" a decision below by changing that decision and basing its judgment on the reasoning that a non-willful violation of the Canons proved a willful violation of the Canons. The Conn. Sup. Ct. attempts to justify the change of charge from a "willful" violation of the Canons to a non-willful violation of the Canons by saying: [App. 34]

> Consequently, the first judge to engage in a given conduct that lessens public confidence in the integrity and impartiality of the judiciary would not be subject to discipline because he would not have been on specific notice that his conduct was prohibited, and he therefore could not be said to have intended to violate the Canons. Thereafter, only those judges who engage in the precise conduct of the first judge would be on notice and subject to discipline under § 51i(a)(2). We decline to adopt such an unworkable interpretation of § 51-51i(a)(2).

Respectfully, that is the precise reason that *In re: Ruffalo, supra,* 550 holds, "He is accordingly entitled to procedural due process, which includes *fair notice of the charge*" [Emphasis added]. Flanagan received no notice of the charge. Further, *In re: Ruffalo, Id.* at 550,

> It was said in *Randall v. Brigham*, 7 Wall. 523, 540 that when proceedings for disbarment are 'not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made and the opportunity afforded him for explanation.'

The change of charge by Connecticut Supreme Court after the trials, briefs, and oral arguments had terminated, is a critical due process violation on the fair notice of the charge issue. Further, *In re: Ruffalo, Id.* at page 551:

> They become a trap when, after they are under way, the charges are amended on the basis of the testimony of the accused he can then be given no opportunity to expunge the earlier statements and start afresh.

It is submitted that there is even a more serious impediment in the instant case, as the charge was changed in the court of last resort in the State of Connecticut when there was no opportunity for by Judge Flanagan to offer a defense except to file a motion to reargue which was denied without comment [App. 58]. He, to this day, has had no opportunity to enter a defense to the "non-willful" allegations. This is particularly onerous when the very judges themselves, as hereinbefore set forth, have rejected a proposed amendment which would have included *personal* conduct in addition to official conduct as a violation. But as aforesaid, it was voted down.

Justice White's concurring opinion, *In re: Ruffalo, Id.* page 555, is illuminating:

> Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds

> of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se.* It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.

Three members of the Review Council voted not guilty. They were the two judges of the three judges on the Council, and one of the three lawyers and he filed the dissent [App. 76 - App. 77]. That dissent speaks directly to the issue raised by Justice White in that two of the three judges, did not find a willful violation of the Canons; the dissenting attorney, found no violation of any Canon in this case. Adultery was deleted from the Connecticut criminal statutes in 1990, and alienation of affections has not been a tort in Connecticut since 1991. The conduct in this case is not *malum in se*. The proof of this, and this is known by the Supreme Court of the State of Connecticut, is that the public defender and the court reporter both are still employed in the same courthouse in Connecticut, and therefore, both the court reporter and the public defender whose testimony concerned their sexual conduct was heard by the very Review Council that found Judge Flanagan guilty, are still active state employees of the State of Connecticut. We cite this not to cause them hardship, but as proof that the conduct charged against Flanagan is not *malum in se*, otherwise the court reporter and public defender would have been terminated.

Several cases speak to the necessity of notice and fairness. *Randall v. Brigham*, 7 Wall. 523, 540,

> . . . notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness is a matter of judicial regulation.

In re: Gault, 387 U.S. 1, 33 (1966), holds:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'

This 1966 case succinctly articulates what Flanagan did not receive from the Supreme Court of the State of Connecticut. So, too, *Selling v. Radford*, 243 U.S. 46, 51 mandates that the State record must show: "1. That the State procedure from want of notice or opportunity to be heard was wanting in due process." Clearly, *Selling* has been violated in the instant case. *In re: Oliver*, 333 U.S. 257, 273 sets forth the requirement that was withheld from Flanagan in the instant case when it states:

> We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. *A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense – a right to his day in court are basic in our system of jurisprudence.* [Emphasis added].

Bouie v. City of Columbia, 378 U.S. 347, 352 condemns the deprivation of a right of fair warning as well as an

unforeseeable and retroactive judicial expansion of precise statutory language. That is exactly what happened in the instant case.

In re: Delassandro, 483 Pa. 431, 397 A.2d 743, 758 (1979), is illustrative in that a married judge [Flanagan is single] engaged in a sexual relationship with a married woman whom the judge appointed as cashier in the domestic relations probation office. The Pennsylvania Supreme Court held,

> The conduct of the respondent involving his relationship with Walton [the married woman] is not in violation with the law under the crimes code of Pennsylvania, adultery . . . does not constitute criminal conduct . . . this court in abolishing the tort of criminal conversation has observed that the cause of action is a 'anachronism' . . . since the respondent's conduct was not prohibited by law there is no basis for discipline regardless of the private views of this court. *Id.* at 758.

Further, *In re: Hasay,* 666 A.2d 795 (Pa.Ct.Jud.Disc.1995) which involved sexual activities between a justice and an adult female that were consensual did not warrant judicial discipline.

It is respectfully submitted that Judge Flanagan did not receive justice in this case because his Fourteen Amendment due process rights were violated and the Supreme Court of the State of Connecticut which violated *In re: Ruffalo, supra,* by changing the charges against Judge Flanagan when he had absolutely no chance to meet those charges when they appeared in the judgment of the Supreme Court of the State of Connecticut. No

person should be found guilty without notice of the charges and the opportunity to defend herself or himself.

Respectfully submitted,

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IN RE ROBERT C. FLANAGAN
(15419)

Callahan, C.J., and Borden, Katz, Palmer and McDonald, Js.

Syllabus

The respondent former Superior Court judge appealed to this court from a decision by the judicial review council to censure him publicly for violating canons 1 and 2A of the Code of Judicial Conduct by engaging in a consensual sexual relationship with a married court reporter, R. R. who had regularly been assigned to the respondent's courtroom over the course of their relationship, had initially filed a complaint alleging that the relationship had been forced or nonconsensual. *Held:*

1. Even if the respondent had not explicitly waived his claim that the review council should have been required to dismiss the proceedings against him when it found that R's initial allegations of a forced or nonconsensual sexual relationship were not supported by probable cause, he could not prevail on that claim; when a citizen complaint against a judge is brought to the attention of the review council, it has the authority to charge the judge on the basis of any conduct revealed by its investigation into the complaint whether or not the conduct forming the basis of the charge was contained in the original complaint; the judge is entitled to reasonable notice of the charges on which he may be disciplined only after the review council has determined what those changes are, and the respondent here was provided with such notice after the review council had completed its investigation.

2. Contrary to the claim made by the respondent, the lack of expert testimony before the review council did

not prevent it from finding that his consensual sexual relationship with a married court employee constituted a wilful violation of the applicable canons of judicial conduct; although professional opinions might have been relevant and therefore admissible, such opinions were unnecessary to a determination of whether the conduct in question had the effect of reducing public confidence in the integrity of the judiciary.

3. The review council properly determined that, in order to be disciplined for a wilful violation of the canons of judicial conduct, a judge need only have intended to engage in the acts for which he is disciplined, regardless of whether the judge had the specific intent to violate the canons.

4. The respondent could not prevail on his claim that, because R had allegedly breached the confidentiality requirements of the applicable statute (§ 51-51*l*[a]) by discussing the case with the media, the review council should have dismissed the charges against him; the respondent failed to prove that the alleged violation had any impact on the fairness of the proceeding before the review council.

5. Although evidence that the respondent had had a nonconsensual sexual relationship with R should have been excluded from the formal hearing before the review council, the respondent failed to sustain his burden of proving that he was harmed by the admission of such evidence.

6. The respondent's three and one-half year consensual affair with a married court reporter regularly assigned to his courtroom was conduct that violated canons 1 and 2A of the Code of Judicial Conduct because it could reasonably lead a knowledgeable observer to question the integrity of the judiciary and

to lose confidence therein; under all of the circumstances here, the review council appropriately imposed public censure against the respondent.

Argued December 11, 1996 – officially released March 18, 1997

Procedural History

Appeal to this court from a decision of the judicial review council to censure publicly the respondent for certain conduct resulting in violations of two of the canons of the Code of Judicial Conduct. *Affirmed.*

Roger J. Frechette, with whom was *Matthew E. Frechette,* for the appellant (respondent).

Gregory T. D'Auria, assistant attorney general, with whom were *Susan Quinn Cobb,* assistant attorney general, and, on the brief, *Richard Blumenthal,* attorney general, and *Carolyn K. Querijero,* assistant attorney general, for the appellee (judicial review council).

Opinion

CALLAHAN, C. J. Former Superior Court Judge Robert C. Flanagan appeals from the decision of the judicial review council (review council) to censure him publicly for engaging in a consensual sexual relationship with a married court reporter who regularly had been assigned to his courtroom over the course of their relationship.[1] Pursuant to General Statutes

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[1] Although public censure was the only sanction imposed by the review council and therefore the only sanction that we review, we note that the Governor did not renominate Flanagan

§ 51-51n(a)(1),[2] the review council is authorized to censure a judge of the Superior Court publicly for a "wilful violation of . . . any canon of judicial ethics . . . ," as set forth in General Statutes § 51-51i(a)(2).[3] The review council

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to serve as a Superior Court judge when his eight year term expired on March 8, 1996, during the pendency of the review council's consideration of the case.

[2] General Statutes § 51-51n provides: "Authority of council. (a) The Judicial Review Council may, after a hearing pursuant to subsection (c) of section 51-51*l*, (1) publicly censure the judge, compensation commissioner or family support magistrate, (2) suspend the judge, compensation commissioner or family support magistrate for a definite term not to exceed one year, (3) refer the matter to the Supreme Court with a recommendation that the judge or family support magistrate be suspended for a period longer than one year, (4) refer the matter to the Supreme Court with a recommendation that the judge or family support magistrate be removed from office or to the Governor with a recommendation that the compensation commissioner be removed from office or (5) exonerate the judge, compensation commissioner or family support magistrate of all charges.

"(b) If public censure is recommended, the chairman shall prepare and forward the censure in writing to the judge, compensation commissioner or family support magistrate being censured, the Chief Justice, the Chief Court Administrator and the joint standing committee on judiciary, at least ten days prior to the publication of the censure. The censure shall be a public record as defined in section 1-19. An appeal from the decision of the council for public censure shall automatically stay the publication of the censure.

"(c) If the council exonerates a judge, compensation commissioner or family support magistrate, a copy of the proceedings and report of the council shall be furnished to the judge, compensation commissioner or family support magistrate."

[3] General Statutes § 51-51i provides in relevant part: "Grounds for removal, suspension and censure. (a) In addition

concluded, after a public hearing, that Flanagan's conduct had violated canons 1 and 2A of the canons of the Code of Judicial Conduct.[4]

The review council's investigation into Flanagan's conduct pursuant to General Statutes § 51-51*l*(a)[5] was

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to removal by impeachment and removal by the Governor on the address of two-thirds of each house of the General Assembly as provided in the Connecticut constitution, a judge shall be subject, in the manner and under the procedures provided in this chapter to censure, suspension or removal from office for (1) conduct prejudicial to the impartial and effective administration of justice which brings the judicial office in disrepute, (2) wilful violation of section 51-39a or any canon of judicial ethics, (3) wilful and persistent failure to perform his duty, (4) neglectful or incompetent performance of his duties, (5) final conviction of a felony or of a misdemeanor involving moral turpitude, (6) disbarment or suspension as an attorney-at-law, (7) wilful failure to file a financial statement or the filing of a fraudulent financial statement required under section 51-46a, or (8) temperament which adversely affects the orderly carriage of justice. . . . "

[4] Canon 1 of the Code of Judicial Conduct provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 2A of the Code of Judicial Conduct provides: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

[5] General Statutes § 51-51*l* provides in relevant part: "(a) Except as provided in subsection (d), the Judicial Review Council shall investigate every written complaint brought before it alleging conduct under section 51-51i, and may initiate

precipitated by a written complaint filed by Penny Ross, a court reporter. In her written complaint, Ross alleged

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an investigation of any judge, compensation commissioner or family support magistrate if (1) the council has reason to believe conduct under section 51-51i has occurred or (2) previous complaints indicate a pattern of behavior which would lead to a reasonable belief that conduct under section 51-51i has occurred. The council shall, not later than five days after such initiation of an investigation or receipt of such complaint, notify by registered or certified mail any judge, compensation commissioner or family support magistrate under investigation or against whom such complaint is filed. A copy of any such complaint shall accompany such notice. The council shall also notify the complainant of its receipt of such complaint not later than five days thereafter. Any investigation to determine whether or not there is probable cause that conduct under section 51-51i has occurred shall be confidential and any individual called by the council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council on whether probable cause exists, unless the respondent requests that such investigation and disclosure be open, provided information known or obtained independently of any such investigation shall not be confidential. The judge, compensation commissioner or family support magistrate shall have the right to appear and be heard and to offer any information which may tend to clear him of probable cause to believe he is guilty of conduct under section 51-51i. The judge, compensation commissioner or family support magistrate shall also have the right to be represented by legal counsel and examine and cross-examine witnesses. . . .

"(b) The council shall, not later than three business days after the termination of such investigation, notify the complainant, if any, and the judge, compensation commissioner or family support magistrate that the investigation has been terminated and the results thereof. If the council finds that conduct under section 51-51i has not occurred, but the judge, compensation commissioner or family support magistrate has

that "[t]here was sex between [herself] and Judge Flanagan on countless occasions over the past four

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acted in a manner which gives the appearance of impropriety or constitutes an unfavorable judicial or magisterial practice, the council may issue an admonishment to the judge, compensation commissioner or family support magistrate recommending a change in judicial or magisterial conduct or practice. If an admonishment is issued, the council shall inform the complainant, if any, that an admonishment was issued, provided the admonishment is the result of misconduct alleged in the complaint and the substance of the admonishment shall not be disclosed.

"(c) If a preliminary investigation indicates that probable cause exists that the judge, compensation commissioner or family support magistrate is guilty of conduct under section 51-51i, the council shall hold a hearing concerning the conduct or complaint. All hearings held pursuant to this subsection shall be open. A judge, compensation commissioner or family support magistrate appearing before such a hearing shall be entitled to counsel, to present evidence and to cross-examine witnesses. The council shall make a record of all proceedings pursuant to this subsection. The council shall not later than fifteen days after the close of such hearing publish its findings together with a memorandum of its reasons therefor.

"(d) No complaint against a judge, compensation commissioner or family support magistrate alleging conduct under section 51-51i shall be brought under this section but within one year from the date the alleged conduct occurred or was discovered or in the exercise of reasonable care should have been discovered, except that no such complaint may be brought more than three years from the date the alleged conduct occurred.

"(e) Notwithstanding the provisions of subsections (a) and (b) of this section, the council shall disclose any information concerning complaints received by the council on and after January 1, 1978, investigations, and disposition of such complaints to the legislative program review and investigations

years." The bulk of Ross' written complaint alleged a course of conduct by Flanagan that she claimed had caused her repeatedly to engage in coerced sexual relations with him during their relationship.

After the probable cause proceedings at which Ross, Flanagan and several other witnesses testified, the review council charged Flanagan with having violated canons 1 and 2A of the Code of Judicial Conduct and § 51-51i(a)(2) by "engag[ing] in a *consensual* sexual relationship with a married court employee. . . ."[6] (Emphasis added.) The

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committee when requested by the committee in the course of its functions, in writing and upon a majority vote of the committee, provided no names or other identifying information shall be disclosed.

"(f) On and after December 19, 1991, any judge, compensation commissioner or family support magistrate who has been the subject of an investigation by the Judicial Review Council as a result of a complaint brought before such council may request that such complaint, investigation and the disposition of such complaint be open to public inspection."

[6] The two formal charges brought against Flanagan are as follows:

"1. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved, in violation of Canon 1 of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes.

"2. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of

review council did not find probable cause to believe that Ross' relationship with Flanagan had been coerced in any way. Implicit in the review council's decision to charge Flanagan for ethical violations based solely on a consensual sexual relationship with a married court employee was the council's rejection of the substance of Ross' written complaint and her testimony at the probable cause hearing concerning coercion. The review council's rejection of Ross' coercion charges finds overwhelming support in the record in that Ross' written complaint and oral testimony were inconsistent and not credible. On cross-examination at the probable cause hearing, Ross admitted to several incidents that would indicate that her relationship with Flanagan had been consensual. Moreover, every other witness at the probable cause hearing testified to facts that left little doubt that the relationship had been consensual. Furthermore, none of the witnesses testified to a belief that Flanagan had coerced Ross to engage in a sexual relationship with him at any time. Finally, Flanagan himself admitted that he had had a sexual relationship with Ross for almost four years but testified that it had been entirely consensual.

After a public hearing conducted pursuant to General Statutes § 51-51*l*(c), at which only Ross, Moira Butler and Shepard Sherwood[7] testified, the review council

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the judiciary, in violation of Canon 2A of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes."

[7] Moira Butler is the affirmative action coordinator for the Judicial Branch. Shepard Sherwood was an assistant public defender assigned to the Superior Court in geographical area number six in New Haven.

made ten findings of fact. Those findings were as follows: "(1) [Flanagan] was, at all relevant times, an active judge of the Connecticut Superior Court. (2) [Ross], at all relevant times, was a court reporter employed by the State Judicial Branch. (3) [Ross], at all relevant times, was a married woman. (4) [Flanagan] engaged in a consensual sexual relationship with [Ross] from March 1992, to October 1995. (5) For substantial periods of time during this relationship, [Ross] was consistently assigned as a court reporter to the courtroom in G.A. 6, New Haven, over which [Flanagan] presided. (6) On many occasions [Ross] was present in the chambers of [Flanagan] before the opening of court, during pretrial conferences with counsel present, and during recesses. (7) From early January 1995 to the fall of 1995, [Ross] also had a sexual relationship with Attorney Shepard Sherwood. (8) Attorney Sherwood was, at all relevant times, an assistant public defender at G.A. 6, New Haven, and weekly, and sometimes more often, appeared before [Flanagan] for pretrials in his chambers and other matters in court in the presence of [Ross] as the assigned court reporter. (9) The expert opinion evidence offered by [Flanagan] was not persuasive. (10) [Flanagan] willfully engaged in the conduct alleged." On the basis of those findings, the review council, by a nine to three vote, recommended a public censure of Flanagan on the grounds that, by engaging in a long-term consensual sexual relationship with his court reporter, he had violated canons 1 and 2A of the Code of Judicial Conduct. This appeal followed.

Flanagan claims that the review council improperly: (1) charged him with consensual sexual misconduct on

the basis of evidence adduced at the probable cause hearing even though Ross' written complaint had been limited to forced or coerced sexual misconduct; (2) concluded that he had violated canons 1 and 2A without any expert testimony to support that conclusion; (3) concluded that he had engaged in a "wilful" violation of canons 1 and 2A in the absence of evidence that he had the specific intent to violate those canons; (4) failed to dismiss the proceedings against him in light of Ross' violation of the confidentiality provision of § 51-51*l*(a); (5) considered evidence beyond the scope of the charges against him at the formal hearing; and (6) concluded, as a matter of law, that a consensual sexual relationship with his married court reporter constituted a violation of canons 1 and 2A.

Before analyzing Flanagan's procedural and substantive claims on appeal, however, we need first to set out the appropriate standards of review for the factual findings and legal conclusions of the review council. In reviewing the factual determinations of the review council, "our review must take into account the risk that unfounded charges of judicial misconduct will impair society's interest in an independent judiciary. We must therefore depart from our normal rule of deference to factfinding by trial courts and administrative agencies. We have a nondelegable responsibility, upon an appeal, to undertake a scrupulous and searching examination of the record to ascertain whether there was substantial evidence to support the council's factual findings." (Internal quotation marks omitted.) *In re Zoarski*, 227 Conn. 784, 789-90, 632 A.2d 1114 (1993); *Council on Probate Judicial*

Conduct re: James H. Kinsella, 193 Conn. 180, 192, 476 A.2d 1041 (1984).

As to the review council's ultimate legal conclusion that the facts found support a finding of a violation of one or more of the canons of the Code of Judicial Conduct, we are persuaded that our review should be de novo. Pursuant to the constitution of Connecticut, article fifth, as amended by article eleven of the amendments, all judges within the state "may, in such manner as shall by law be prescribed, be removed or suspended by the supreme court." In addition to the authority it bestows upon this court, article fifth, as amended by article eleven of the amendments, also permits the General Assembly to create a judicial review council with the power to censure or to suspend any judge for a period not to exceed one year. The constitutional provisions relating to the disciplinary powers of this court have been codified at General Statutes § 51-51j.[8] Similarly, the constitutional provisions pertaining to the powers of the review council have been codified at General Statutes § 51-51n.[9]

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[8] General Statutes § 51-51j provides in relevant part: "(a) The Supreme Court may remove or suspend any judge . . . for any period upon recommendation of the Judicial Review Council, established under section 51-51k, or on its own motion. Upon receipt of such recommendation or on its own motion, the Supreme Court shall make an investigation of the conduct complained of and hold a hearing thereon, unless such an investigation and hearing has been held by the Judicial Review Council. . . . "

[9] See footnote 2.

Additionally, General Statutes § 51-51r[10] provides that any judge aggrieved by a decision of the review council may appeal that decision directly to this court. Together, the statutory and constitutional provisions make clear that this court may institute disciplinary proceedings against any judge and, after a hearing, remove or suspend any judge found guilty of a disciplinary violation. Although the review council is also empowered to review matters of judicial discipline, it may never order discipline more severe than a one year suspension. In those cases in which the review council believes that a sanction more severe than a one year suspension is appropriate, it only may recommend a disposition of the matter to this court, which has sole authority to suspend a judge for a period greater than one year or to remove a judge from office.[11] Moreover, even in those instances in which the action deemed appropriate by the review council is a one year suspension or any lesser form of discipline, this court may always review such decisions of the review council under § 51-51r.

Because we are empowered, by the constitution as well as by § 51-51j, to determine all matters of judicial discipline in the first instance as well as upon appeal of the review council's decisions, we conclude that our

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[10] General Statutes § 51-51r provides: "Appeals, rules. Any judge or family support magistrate aggrieved by any decision of the Judicial Review Council may appeal the decision to the supreme court in accordance with such procedure for the appeal as the Supreme Court shall adopt by rule."

[11] In addition, the legislature may, if it deems it appropriate, institute impeachment proceedings under article fifth, § 2, of the Connecticut constitution.

review of the review council's legal conclusions is de novo. This approach promotes consistency in the enforcement of judicial discipline and finds support in the decisions of many of our sister Supreme Courts. See *In re Inquiry Concerning a Judge*, 788 P.2d 716, 722 (Alaska 1990) (Supreme Court is "entrusted with the ultimate decision in matters of judicial qualifications" and will "independently evaluate the evidence of record"); *In the Matter of McClain*, 662 N.E.2d 935, 937 (Ind.1996) (de novo review of facts and law); *In re Jenkins*, 437 Mich. 15, 18, 22, 465 N.W.2d 317 (1991) (de novo review of law and facts, with appropriate deference to assessment of credibility by special master); *In re Miera*, 426 N.W.2d 850, 855 (Minn. 1988) (Supreme Court "makes an independent review of the record"); *In re Elliston*, 789 S.W.2d 469, 476 (Mo. 1990) ("independent review of the charges on which the Commission found guilt"); *In re Kelly*, 225 Neb. 583, 585, 407 N.W.2d 182 (1987) (de novo review on record); *In the Matter of Seaman*, 133 N.J. 67, 75, 627 A.2d 106 (1993) (de novo review to decide "whether the facts as determined demonstrate conduct on the part of the respondent that is incompatible with [the] canons"); *In the Matter of Greenfield*, 76 N.Y.2d 293, 295, 557 N.E.2d 1177, 558 N.Y.S.2d 881 (1990) (state constitution confers on Court of Appeals "plenary power to review the law and the facts as well as the sanction"); *In re Bullock*, 328 N.C. 712, 717, 403 S.E.2d 264 (1991) (Supreme Court must exercise independent judgment); *In the Matter of Disciplinary Action Against Wilson*, 461 N.W.2d 105, 107 (N.D. 1990) (de novo on record); *Cincinnati Bar Assn. v. Heitzler*, 32 Ohio St. 2d 214, 220, 291 N.E.2d 477 (1972), cert. denied, 411 U.S. 967, 93 S. Ct. 2149, 36 L. Ed. 2d 687 (1973) (Supreme Court has

" 'full responsibility for determining what the facts are and what action should be taken on those facts' "); *In the Matter of Chiovero,* 524 Pa. 181, 187, 570 A.2d 57 (1990) (Supreme Court must undertake independent review of record created by judicial review and inquiry board); *In the Matter of Deming,* 108 Wash. 2d 82, 87, 736 P.2d 639 (1987) (de novo review of facts and law); *In the Matter of Hey,* 193 W. Va. 572, 577, 457 S.E.2d 509 (1995) (" 'Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings' ").[12]

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[12] We note that at least four states have established other hybrid standards that attempt to incorporate the notion of "independent review" as well as some deference to the legal conclusions of their equivalent to our review council. See *Ryan v. Commission on Judicial Performance,* 45 Cal.3d 518, 530, 754 P.2d 724, 247 Cal. Rptr. 378 (1988) ("[independent] review" but "accord great weight to the legal conclusions of the Commission"); *In re McAllister,* 646 So. 2d 173 (Fla. 1994) (" 'The findings and recommendations of the Judicial Qualifications Commission are of persuasive force and should be given great weight. However, the ultimate power and responsibility in making a determination rests with this Court.' "); *In re Hill,* 152 Vt. 548, 556, 568 A.2d 361 (1989) (Supreme Court is final arbiter but "great weight" accorded judicial conduct board's findings and conclusions); *In re Kaiser,* 111 Wash. 2d 275, 279, 759 P.2d 392 (1988) ("de novo" review on record while according "considerable weight" to findings and recommendation of commission). The California Supreme Court has recently justified its reliance on the legal conclusions of its commission on judicial performance on the basis of that commission's expertise. *Dodds v. Commission on Judicial Performance,* 12 Cal. 4th 163, 168, 906 P.2d 1260, 48 Cal. Rptr. 2d 106 (1996). Such a justification is inappropriate here because our review council, composed of three judges, three lawyers and six members with no legal training, has no more expertise in matters of judicial

We turn next to the merits of Flanagan's contentions on appeal. We are not persuaded that any of them warrants reversal of the review council's conclusions.

I

Flanagan first claims that the review council was required to dismiss the proceedings against him when it found that Ross' allegations of a forced or nonconsensual sexual relationship were not supported by probable cause. Flanagan argues that, pursuant to the due process clause of the fourteenth amendment to the United States constitution[13] and § 51-51*l*, the review council is without authority to make a finding of probable cause based upon facts that are not specifically alleged in the complaint that initiates the review council's investigation. We disagree.

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ethics than does this court. Because our constitutional and statutory scheme gives this court sole authority to impose discipline in the most serious cases and either sole authority or at least power of review in less serious cases, we conclude that deference to the review council's conclusion that certain conduct violates § 51-51i is inappropriate.

We also note that the "substantial evidence" standard articulated by this court in *In re Zoarski*, supra, 227 Conn. at 789-90, and *Council on Probate Judicial Conduct re: James H. Kinsella*, supra, 193 Conn. 192, was grounded in the review council's superior position to assess credibility and thus was intended to apply only to the review council's findings of fact. Any suggestion in those opinions that we will accord a similar modicum of deference to the review council's conclusions of law is disapproved.

[13] Flanagan raises no independent state constitutional argument.

In addressing this claim, it is necessary to examine the statutory and regulatory procedures governing judicial discipline and how those procedures were employed in this case. The statutory and regulatory scheme pertaining to judicial discipline divides the procedure to be followed by the review council into two discrete stages: (1) an investigatory stage, during which the review council, acting either on a formal complaint or its own motion, may hold a confidential hearing to determine whether probable cause exists to believe that a judge has engaged in misconduct; and (2) in the event that the review council determines that probable cause does exist, an adjudicatory stage in the form of a public hearing to determine whether a violation has occurred. General Statutes § 51-51*l*;[14] Regs., Conn. State Agencies § 51-51k-6.[15]

In this case, the proceedings before the review council, as dictated by the statutes and regulations, were divided into those distinct investigatory and adjudicatory stages. The investigation into Flanagan's conduct was instigated by a written complaint from Ross alleging that Flanagan had coerced her into having sexual relations with him on various occasions for a period of more than

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[14] See footnote 5.

[15] Section 51-51k-6 of the Regulations of Connecticut State Agencies provides: "Procedure on complaints

"The procedure on a complaint shall be an investigation to determine whether probable cause, to believe that the person being investigated is guilty of conduct set forth in section 51-51i of the General Statutes, exists, and an open hearing if such probable cause is found to exist."

three and one-half years.[16] Upon receipt of Ross' complaint, the review council provided a copy thereof to Flanagan and notified him of its intent to hold a confidential investigatory hearing to determine whether probable cause existed to believe that he had engaged in conduct that would constitute a violation of one or more of the canons of the Code of Judicial Conduct. The notice provided that "[t]he area of inquiry by the council will be whether the conduct alleged in the complaint occurred, and, if it did, whether such conduct violated Canons 1, 2A or 2B of the Code of Judicial Conduct in violation of Section 51-51i(a) of the Connecticut General Statutes." In accordance with § 51-51*l*(a),[17] Flanagan was also notified that he had the right to attend the probable cause hearing, to be represented by counsel, to testify, to present evidence and to examine and cross-examine witnesses. Pursuant to § 51-51k-5 of the Regulations of Connecticut State Agencies, Flanagan filed a written response with the

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[16] The review council points out that, in one statement in her complaint, Ross simply alleged that "[t]here was sex between [herself] and Judge Flanagan on countless occasions over the past four years." The review council argues, on the basis of this statement in isolation, that the initial complaint "did not . . . allege only rape and forced sex." We disagree. The above statement is preceded in the same paragraph by allegations that Flanagan followed her, and succeeded in the same paragraph by allegations that Flanagan "demanded" that she have sexual intercourse with him and that he had become increasingly "threatening" toward her. The rest of the statement similarly is replete with allegations of threats and coercion. When read as a whole, it is clear that the gravamen of the initial complaint was that Flanagan had coerced Ross to have a sexual relationship with him for four years.

[17] See footnote 5.

review council.[18] This response stated: "I deny the material allegations of the complaint as formulated by Ms. Penny Ross as set forth in her statement to Ms. Moira Butler."

Flanagan elected to appear at the hearing with counsel, to cross-examine the witnesses presented by the executive director and to present his own witnesses and testify on his own behalf. In his testimony, Flanagan admitted that he had had a consensual sexual relationship with Ross for approximately three and one-half years and that she had been assigned to his courtroom for much of that time. Flanagan denied that he had made any threats or that he had abused his position of authority in any way. After the probable cause hearing, the review council formally charged Flanagan with two counts of misconduct alleging that Flanagan's "consensual sexual relationship with a married court employee" had violated canons 1 and 2A of the Code of Judicial Conduct.

In response to the review council's issuance of formal charges, Flanagan's counsel sent a letter to the executive director of the review council stating that it was Flanagan's position that, by issuing charges on grounds not specifically alleged in Ross' complaint, the review council had initiated a new "investigation" and that Flanagan was entitled to a new probable cause hearing based on that conduct rather than proceeding immediately to the formal hearing stage. After stating that

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[18] Section 51-51k-5 of the Regulations of Connecticut State Agencies provides in relevant part: "The judge . . . may, within twenty days after receipt of the notice of the complaint . . . send a written reply to the complaint to the Council. . . . "

position, however, Flanagan's counsel wrote: "Nevertheless, we want to and will treat the hearing as a formal hearing."[19] Flanagan also filed an answer to the review council's charges in which he responded to both counts of the charging document by admitting that he had "engaged in a consensual sexual relationship with a married court employee" but denying that such conduct constituted a violation of either canon 1 or 2A.

Flanagan now argues, for the first time, that, "[h]aving found that [he] did not violate the code under the conduct alleged [in the initial citizen complaint] – rape and forced sex – the [review council] was legally

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[19] The letter from Flanagan's attorney to the executive director of the review council provided in relevant part: "The investigation of Judge Flanagan was based on the written complaint brought by Ms. Ross. The [review council] did not find probable cause as to the allegations of forced sex/rape contained in the complaint. The investigation which took place on February 15, 16 and 21 was not initiated by the [review council], but, rather, was initiated by the written complaint of Ms. Ross.

"Therefore, when the Council issued its 'probable cause/consenting sex' comment, it was initiating a *new* investigation.

"Whereas a formal hearing has been set for [April 16, 1996], this hearing should properly be a probable cause hearing on the new and different investigation initiated by the [review council], namely the investigation of consenting sex. Nevertheless, we want to and will treat the hearing as a formal hearing.

"My reason for sending this letter is that it seems to me reasonable that, pursuant to [General Statutes] § 51-51q (a), the [review council] recommend the nomination of the Honorable Robert C. Flanagan for reappointment.

"May I have your thoughts?" (Emphasis in original.)

obliged to dismiss the complaint for lack of probable cause." Flanagan claims that the United States Supreme Court's decision in *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), is dispositive of this claim. We reject this argument on two alternate grounds: (1) Flanagan explicitly waived the claim in his letter to the executive director of the review council; and (2) even in the absence of waiver, *Ruffalo* does not require that a judge be given notice, during the *investigatory* stage of the proceedings against him, of each of the precise charges upon which he may be sanctioned.

As noted previously, Flanagan's counsel sent a letter to the executive director of the review council in which he claimed that the procedure afforded by the council in finding probable cause on conduct not specifically alleged in the initial complaint by Ross may have been constitutionally suspect. In that letter, however, his counsel explicitly waived any claim on that basis by stating that Flanagan wanted to and would proceed to the formal hearing stage. Flanagan's counsel never again made any claim of lack of notice until his brief to this court. Because of this explicit waiver, we are not bound to consider the merits of Flanagan's notice claim. Practice Book § 4061.

Moreover, even if we were to address Flanagan's claim under *Ruffalo*, we are not persuaded that he could prevail. Ruffalo had been an active trial lawyer who was counsel in many actions against railroad companies under the Federal Employers' Liability Act. *In re Ruffalo*, supra, 390 U.S. 546. After an investigation into Ruffalo's handling of those cases, the Association of American Railroads made several charges of impropriety to the

local bar association. Id. The Ohio board of commissioners on grievances and discipline (Ohio board) subsequently filed formal charges against Ruffalo. Id. The Ohio board charged Ruffalo with twelve counts of misconduct, two of which accused Ruffalo of soliciting clients through an agent, Michael Orlando. Id. At the formal hearings on the charges, both Ruffalo and Orlando testified that Orlando had not solicited clients but that he had merely investigated certain complaints, some of which involved Orlando's employer, the Baltimore & Ohio Railroad. Id. After hearing that testimony, the Ohio board added a thirteenth count of misconduct to its charge against Ruffalo based upon his hiring of Orlando to investigate Orlando's employer. Id. A motion to strike the additional count was denied, and Ruffalo was given an extended continuance in order to respond to the new charge against him. Id., 547. After the continuance, no new evidence pertaining to the thirteenth count was introduced and the Ohio board sustained the charge contained in that count, as did the Ohio Supreme Court upon review. Id. Ruffalo was ordered disbarred in the state courts of Ohio. Id.

On the basis of the record and findings of the Ohio Supreme Court, the Sixth Circuit Court of Appeals subsequently disbarred Ruffalo from practice in that court on the grounds charged in the thirteenth count by the Ohio board. *In re Ruffalo*, 370 F.2d 447 (6th Cir. 1966). The United States Supreme Court granted certiorari to review the Sixth Circuit disbarment. *In re Ruffalo*, 389 U.S. 815, 88 S. Ct. 30, 19 L. Ed. 2d 66 (1967).

The United States Supreme Court examined the procedure afforded Ruffalo in the state courts because, in

determining whether disbarment by a state should be followed by disbarment on the same grounds in a federal court, the federal court must consider whether " 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' " *In re Ruffalo,* supra, 390 U.S. at 550, quoting *Selling v. Radford,* 243 U.S. 46, 51, 37 S. Ct. 377, 379, 61 L. Ed. 585 (1917). The court concluded that, because attorney discipline proceedings are quasi-criminal in nature, an attorney is entitled by due process to reasonable notice of the charges against him "before *the proceedings* commence." (Emphasis added.) *In re Ruffalo,* supra, 390 U.S. 551. The court reasoned that the proceedings could "become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." Id., 551.

Since *Ruffalo,* we have affirmed that an attorney subject to disciplinary proceedings must be given reasonable notice of the charges against him or her "before *the proceedings* commence"; (emphasis added) *Statewide Grievance Committee v. Botwick,* 226 Conn. 299, 308, 627 A.2d 901 (1993); and that this rule applies with equal force to judicial discipline proceedings. *Council on Probate Judicial Conduct re: James H. Kinsella,* supra, 193 Conn. 207. We conclude, however, that, under *Ruffalo,* "the proceedings" in advance of which reasonable notice must be given in judicial discipline proceedings are not the probable cause proceedings because those proceedings are investigatory, rather than adjudicatory, in nature.

We are guided by our decision in *Statewide Grievance Committee v. Presnick,* 215 Conn. 162, 168-70, 575 A.2d 210 (1990), in which we addressed a procedural due process claim in the context of attorney disciplinary proceedings

and distinguished between the different process due at the investigatory and adjudicatory stages of such proceedings. Presnick had appealed a decision of the Superior Court suspending him from the practice of law for a period of one year. Id., 163. He claimed, inter alia, that he had been denied due process of law because, at the stages preceding his formal presentment to the Superior Court, he had not been given the opportunity to cross-examine witnesses or to present his own testimony. Id., 168. We rejected Presnick's due process claim because the stages of the disciplinary process at which the alleged procedural defects occurred "served only as a predicate to a decision to file a presentment against the defendant in the Superior Court. The presentment that followed permitted the defendant a hearing in Superior Court according to the customary rules of evidence, and at which time he had the right to be present, to be represented by counsel if he chose, to cross-examine witnesses and to present evidence in his own behalf." Id., 170. We concluded that the process given to Presnick, "when viewed in its totality, was adequate to meet the procedural safeguards required by the federal and state constitutions." Id.

We conclude that the due process protections afforded in disciplinary proceedings by *Ruffalo* and its progeny are inapplicable unless and until the review council brings formal charges akin to the presentment to the Superior Court in attorney discipline proceedings. "Simply stated, a judge does not have the [constitutional] right to defend against a proceeding that has not yet been brought." *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 528, 754 P.2d 724, 247 Cal. Rptr. 378 (1988).

Several other courts have drawn the distinction between the process due at the investigatory and adjudicatory stages of judicial disciplinary proceedings that we draw today. In the most analogous case, *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 519, 526 P.2d 268, 116 Cal. Rptr. 260 (1974), the California Supreme Court concluded that a judge who had been the subject of disciplinary proceedings had not been denied due process when he was not apprised of the commission's preliminary investigation into citizen complaints against him. The court concluded that, at the investigatory stage, "the Commission [on Judicial Qualifications] clearly has not yet commenced to perform any adjudicatory function, but is merely attempting to examine citizen complaints in a purely investigatory manner. Accordingly, notice to the judge under investigation as to the nature of the complaints against him is not compelled as a matter of due process." Id. Similarly, other jurisdictions have rejected other claimed due process rights at the investigatory stage of judicial disciplinary proceedings, including: the right to discovery; *In re Petition to Inspect Copy Grand Jury Materials*, 576 F. Supp. 1275, 1284 (S.D.Fla.1983) ("[d]uring the investigatory stage, the required procedural protections are minimal at most"); the right to be present; *In the Matter of Troy*, 364 Mass. 15, 24, 306 N.E.2d 203 (1973) (investigation before special commissioner "wholly antecedent to the filing of the Information"); the right to know the identity of one's accusers; *In re Elliston*, supra, 789 S.W.2d at 473 (judge is only "entitled to know about the persons who will be called upon to give testimony in a *formal* hearing" [emphasis added]); and the right to cross-examine

adverse witnesses; *In re "Judge Anonymous"*, 590 P.2d 1181, 1186 (Okla.1978) ("the proceedings before the Council on Judicial Complaints are only investigatory in nature, as opposed to being adjudicatory in nature").

We conclude that when a citizen complaint against a judge is brought to the attention of the judicial review council, the council has authority subsequently to charge that judge with a violation of § 51-51i based on any conduct of the judge revealed by its investigation into the complaint, whether or not the conduct forming the basis of the charge was contained specifically in the original complaint.[20] This conclusion is consistent with the conclusions reached in other jurisdictions. See *In re Petition to Inspect Grand Jury Materials*, supra, 576 F. Supp. 1284 ("sole duty at the investigatory stage of the Committee's work is to 'conduct an investigation as extensive as it considers necessary' "); *In re Elliston*, supra, 789 S.W.2d 473 (state constitution should not be read "as limiting the Commission's authority to take action against any possible judicial misconduct that might come to its attention").

Two interests must be accommodated in judicial disciplinary proceedings: (1) the review council must have

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[20] This conclusion is consistent with § 51-51l (e), which provides for the adjudicatory hearing: "If a preliminary investigation indicates that probable cause exists that the judge . . . is guilty of *conduct* under § 51-51i, the council shall hold a hearing concerning the *conduct or complaint*." (Emphasis added.) This language and structure supports the conclusion that the initial investigation is triggered by allegations or disclosure of judicial misconduct, but that the formal adjudicatory phase focuses on the facts of the judicial conduct that the investigation yields.

broad authority to investigate the conduct of our judges in order to maintain public confidence in the judiciary; and (2) our judges must be afforded adequate process before discipline is imposed to ensure that discipline is not imposed on the basis of unfounded charges of misconduct. See *Kucej v. Statewide Grievance Committee*, 239 Conn. 449, 462-63, 686 A.2d 110 (1996) (similar competing concerns in attorney discipline proceedings). We conclude that our statutory scheme, on its face and as applied here, adequately serves both of those interests. The review council cannot be constitutionally bound by the four corners of citizen complaints that may be incomplete or inaccurate. A judge is only entitled to reasonable notice of the charges upon which he may be disciplined after the review council has determined what those charges are. Discipline may not be imposed in the absence of a formal hearing preceded by reasonable notice of the charges. In this case, Flanagan was provided reasonable notice of the charges after the review council had completed its investigation and before the formal hearing.

II

Flanagan next asserts that, as a matter of law, the lack of any expert testimony before the review council that a consensual sexual relationship with a married court reporter violates canons 1 and 2A of the Code of Judicial Conduct prevents the review council from finding a wilful violation of those canons in violation of § 51-51i(a)(2). Flanagan claims that our previous decisions in *In re Zoarski*, supra, 227 Conn. 793-94, and *Levinson v. Board of Chiropractic Examiners*, 211 Conn. 508, 525,

560 A.2d 403 (1989), require expert testimony in judicial review proceedings if a majority of the decisionmaking body is not composed of "experts," i.e., either judges or lawyers. We disagree.

Zoarski addressed the need for expert testimony in judicial review proceedings in light of our statement in *Levinson* that, "[a]s long as the board hearing and deciding a [medical] licensing matter is composed of at least a majority of experts in the field involved in the case, the board may rely on its own expertise in evaluating charges against persons licensed by the board and the requisite standard of care by which to judge such cases." *Levinson v. Board of Chiropractic Examiners*, supra, 211 Conn. 525. In *Zoarski*, we rejected the judge's claim under *Levinson* for two reasons: (1) at that time, the review council consisted of a "majority of experts" in that its membership included three judges, three lawyers and only five laypersons; and (2) "[i]n addition, this court's searching review of a finding of judicial misconduct assures the application of proper standards in any particular case." *In re Zoarski*, supra, 227 Conn. 794.

This case differs from *Zoarski* in that, since *Zoarski*, the legislature has added an additional layperson to the review council so that the council is now composed of the same number of laypersons as judges and lawyers. Public Acts 1992, No. 92-160, § 2. Because of the present representational balance on the review council, we are now asked to determine whether the "majority of experts" rule expressed in *Levinson* applies to this case. We conclude that it does not.

Levinson was drawn from and is part of a body of administrative law jurisprudence that addresses the issue of whether private actors can have their professional or trade competence judged by laypersons who ordinarily would not possess the specific professional or trade expertise necessary to make such a judgment without an expert's opinion. *Levinson v. Board of Chiropractic Examiners*, supra, 211 Conn. 525. Such concerns about professional or trade expertise are simply not present here. The issues before the review council were whether Flanagan, by engaging in a consensual sexual relationship with a married court reporter who regularly had been assigned to his courtroom, had failed: (1) "to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved"; or (2) "to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . " In determining whether expert testimony was required in this case to support a finding of an ethical violation by Flanagan, we must consider whether "the determination of the standard of care requires knowledge that is beyond the experience of [the] fact finder," i.e., the review council. *Santopietro v. New Haven*, 239 Conn. 207, 226, 682 A.2d 106 (1996); see *Jaffe v. Dept. of Health*, 135 Conn. 339, 349, 64 A.2d 330 (1949); *Sickmund v. Connecticut Co.*, 122 Conn. 375, 379, 189 A. 876 (1937); *Slimak v. Foster*, 106 Conn. 366, 368, 138 A. 153 (1927); *Matyas v. Minck*, 37 Conn.App. 321, 326, 655 A.2d 1155 (1995); see also *State v. McClary*, 207 Conn. 233, 245, 541 A.2d 96 (1988) (expert testimony required because nature and cause of victim's injuries "manifestly beyond the ken of the average trier of fact, be it judge or jury").

Unlike *Santopietro*, this is not a case in which the claims to be decided "are akin to allegations of professional negligence or malpractice, which we have previously defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. *Davis v. Margolis*, 215 Conn. 408, 415, 576 A.2d 489 (1990)." (Internal quotation marks omitted.) *Santopietro v. New Haven*, supra, 239 Conn. 226. The sole issue before the review council was whether a judge's consensual sexual relationship with a married court reporter who regularly had been assigned to his courtroom either compromises the integrity and independence of the judiciary or lessens public confidence that such integrity and independence exists. These questions may be answered as competently by those without formal legal training as by those with such training. Although professional opinions may have been relevant to the review council's inquiry in this case and, therefore, admissible,[21] such opinions are unnecessary to a determination of whether certain conduct has the effect of reducing public confidence in the integrity of the judiciary, irrespective of whether the review council is composed of a "majority of experts." Indeed, to create a rule of law requiring expert testimony in judicial discipline cases focusing on the public's perception of the judiciary

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[21] Flanagan was permitted to introduce the opinion of an ethics expert. That opinion, however, was rejected by the review council as "not persuasive."

would contravene the legislature's desire to have an equal "lay" voice on the council as articulated in Public Acts 1992, No. 92-160.[22]

III

Flanagan next argues that in order for a judge to be disciplined for a "*wilful* violation of . . . any canon of judicial ethics" under § 51-51i(a)(2), the judge must have known "that his alleged conduct was forbidden under the Canons and that he acted with the specific intent to violate said Canons." The review council, on the contrary, contends that, in order to be disciplined under § 51-51i(a)(2), the judge need only have intended to engage in the acts for which he is disciplined without necessarily having specific knowledge that such conduct amounts to a violation of one of the canons. We agree with the review council.

Our inquiry is one of statutory construction. In the context of the statutes pertaining to the discipline of probate judges, which provide for discipline for conduct that "violate[s] any . . . canon of ethics applicable to judges of probate"; General Statutes § 45a-63 (formerly General Statutes § 45-11e); we have stated that "[s]cienter is not essential for the occurrence of an ethical violation. Judges no less than lawyers are chargeable for deviations

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[22] Even if we were to accept Flanagan's argument that a "majority of experts" was necessary in this case to avoid the need for expert testimony, Flanagan concedes that judges would be such "experts" and, therefore, our de novo review would be sufficient to satisfy the rule. See *In re Zoarski*, supra, 227 Conn. 794.

from the codes governing their conduct, even though the application of the canons to particular circumstances may not be readily apparent." *Patterson v. Council on Probate Judicial Conduct*, 215 Conn. 553, 567, 577 A.2d 701 (1990). We have since repeated this same language from *Patterson*, eschewing the necessity for scienter when interpreting § 51-51i(a)(1), which makes sanctionable "conduct prejudicial to the impartial and effective administration of justice which brings the judicial office [into] disrepute." See *In re Zoarski*, supra, 227 Conn. at 791. Flanagan claims, however, that in *Zoarski*, we limited the applicability of *Patterson* to cases involving § 51-51i(a)(1), by stating that "[i]n contrast to § 51-51i(a)(2), prejudicial judicial conduct under § 51-51i(a)(1) does not require proof of a wilful violation of the canons of judicial ethics." Id. We disagree with Flanagan's interpretation of the dictum in *Zoarski*. We conclude that specific intent to violate the canons is not required by § 51-51i(a)(2).

" '[W]illful' " is a word " 'of many meanings, its construction often being influenced by its context.' " *Screws v. United States*, 325 U.S. 91, 101, 65 S. Ct. 1031, 89 L.Ed. 1495 (1943). In the context of the subsection of our judicial discipline statute that codifies the canons of the Code of Judicial Ethics, the term "wilful" cannot reasonably be read to require a specific intent to violate the canons given the necessarily broad and flexible nature of those canons. *In the Matter of Young*, 522 N.E.2d 386, 388 (Ind. 1988) (canons 1 and 2 not unconstitutionally vague); *In re Gillard*, 271 N.W.2d 785, 809 n. 7 (Minn. 1978) ("constitutionality of necessarily broad standards of professional conduct has long been recognized"); *In the Matter of Seraphim*, 97 Wis. 2d 485, 497, 294 N.W.2d 485 (1980)

("greater degree of flexibility and breadth is permitted with respect to judicial disciplinary rules and statutes than is allowed in criminal statutes").

We are persuaded by an opinion of the Supreme Court of Oregon construing a constitutional provision authorizing judicial discipline for a " '[w]ilful violation of any rule of judicial conduct as shall be established by the Supreme Court.' " *In re Gustafson*, 305 Or. 655, 657, 756 P.2d 21 (1988). In response to the sanctioned judge's argument that the term "wilful" required a specific intent to violate a given rule, the Oregon court stated that "ignorance of the governing standards of conduct themselves no more excuses judges than those whom they judge." Id., 660. A judge may be sanctioned for a wilful violation of one of the canons of judicial conduct if he intended to engage in the conduct for which he is sanctioned "whether or not [he] knows that he violates the rule." Id.

Any other rule would violate the canon of statutory construction that we will avoid constructions that lead to absurd, unworkable or bizarre results. *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 187, 592 A.2d 912 (1991). To require that a judge subjectively have known that his conduct was in violation of the canons of judicial conduct would make it extremely difficult, if not impossible, to discipline a judge pursuant to § 51-51i(a)(2) for violating those canons. Given the broad and flexible nature of the canons, particularly canons 1 and 2A at issue here, competent proof of a judge's specific intent to violate those canons would be nearly impossible to obtain absent a previous authoritative interpretation of the canons, presumably from this court, that certain specific

conduct was a violation. Consequently, the first judge to engage in a given conduct that lessens public confidence in the integrity and impartiality of the judiciary would not be subject to discipline because he would not have been on specific notice that his conduct was prohibited, and he therefore could not be said to have intended to violate the canons. Thereafter, only those judges who engage in the precise conduct of the first judge would be on notice and subject to discipline under § 51-51i(a)(2). We decline to adopt such an unworkable interpretation of § 51-51i(a)(2). We conclude, therefore, that a judge is subject to discipline for a "wilful violation of . . . any canon of judicial ethics" as long as he or she intends to engage in the conduct for which he or she is disciplined, whether or not he or she has the specific intent to violate the canon.

IV

Flanagan next contends that the judicial review council should have dismissed the charges against him because, he argues, Ross violated the confidentiality provision of § 51-51l (a)[23] when she disclosed information to two newspaper reporters during the probable cause investigation. At the probable cause hearing, Ross testified that sometime in January, 1996, approximately two months after she filed her complaint with the judicial review council and one month prior to the probable cause hearing, she acted as the second source for a Hartford Courant story concerning the investigation of Flanagan

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[23] See footnote 5.

and his alleged acts of impropriety. Ross testified that the reporter had already been aware of the review council's investigation and that she merely had confirmed elements of the story, which was published in the Hartford Courant on January 20, 1996. After her testimony at the probable cause hearing on February 15, Ross twice was reminded by the chairperson of the review council that the probable cause proceedings were confidential. Thereafter, on February 21, 1996, the New Haven Register reported on a February 20, 1996 interview with Ross, given at a time when the probable cause hearing was being conducted, in which she was quoted detailing aspects of her allegations against Flanagan. Flanagan argues that Ross' actions in speaking with the press concerning the allegations in her complaint to the review council amounted to a breach of the confidentiality provision of § 51-51l (a). He argues that her breach undermined the fairness of the review council's investigation and required that the review council dismiss all charges against him. He alleges that Ross' public disclosures to the media "irrevocably tainted" the review council's deliberations. See *In re Zoarski* supra, 227 Conn. 794. We disagree.

Section 51-51l provides that probable cause hearings shall be confidential and that persons called by the review council for the purpose of providing information shall not disclose their "knowledge of such investigation" to third parties prior to the review council's probable cause decision. In *In re Zoarski,* supra, 227 Conn. 794-95, we stated that violations of the confidentiality provision of § 51-51l (a) do not require dismissal of the charges lodged against a judge "[i]n the absence of allegation or

proof that [the] . . . public disclosures had any impact whatsoever on the fairness of the council's deliberations. . . . " We found the judge's argument in *Zoarski* unpersuasive because he had not proved, or even alleged, that the confidentiality breaches in that case had affected the fairness of the review council's deliberations in any way.

Flanagan seeks to distinguish the present case from *Zoarski* on the simple basis that, in the present case, he at least alleges that the confidentiality breaches affected the fairness of the review council's deliberations. We conclude that the mere allegation that a § 51-51l confidentiality breach has affected the fairness of the review council's deliberations is insufficient, however, to require the dismissal of misconduct charges that have been leveled against a judge. *Zoarski* dictates that such claims of unfairness need to be supported by something more than mere conclusory assertions before dismissal of the charges is required. The only "proof" set forth by Flanagan is his unsupported allegation that the deliberative process of the review council was affected by the media publicity concerning Ross' allegations. While we strongly condemn any effort to influence a decision of the review council through violations of § 51-51l, the fact remains that Flanagan stipulated before the review council that he had had an extended sexual relationship with a married court employee. That stipulation contains the only facts necessary to the review council's censure and are the facts upon which we base our independent review. Even if we assume that Ross violated § 51-51l when she spoke with the two newspaper reporters, Flanagan has failed to prove that her violation had any impact "on the fairness of the council's

deliberations. . . . " *In re Zoarski*, supra, 227 Conn. 795. Therefore, his claim that the review council should have dismissed the charges against him is unfounded.

V

Flanagan next asserts that the review council improperly considered evidence of a coerced or forced sexual relationship at the formal hearing where, he argues, the testimony should have been limited to testimony pertaining to a consensual sexual relationship. While we agree with Flanagan that any evidence of a forced or coerced sexual relationship should have been excluded from the formal hearing, Flanagan has failed to meet his burden of proving that he was harmed by the admission of any such evidence.

The following facts are relevant to this issue. Prior to the formal hearing, Flanagan filed a motion in limine seeking to exclude all evidence of a nonconsensual sexual relationship. By an eleven to one vote, the review council denied the motion in limine but noted that Flanagan's counsel would be free to object to specific testimony as the need arose. After Ross testified that she had been "raped" and that her relationship with Flanagan had been "nonconsensual," Flanagan moved to strike any testimony about nonconsensual sex. After meeting in executive session, the review council granted the motion to strike all previous testimony about nonconsensual sexual relations. To avoid further testimony about nonconsensual sexual relations, the chairperson of the review council stated: "I would consider this a continuing objection

and I will continually grant it. The Council will not consider evidence of sexual acts other than as described in the charges."

Thereafter, Ross again attempted to testify that her relationship with Flanagan had been nonconsensual. Her testimony in that vein consistently was stricken from the record. In response to questions about whether she had had a consensual sexual relationship with Flanagan, Ross twice responded that she had not. Last, Flanagan points to testimony where, before being interrupted by Flanagan's counsel, Ross twice began to testify that Flanagan had "demanded" that she go to his house. In response, the chairperson of the review council instructed counsel to wait until the response had been completed before objecting. Ross then amended her response and did not include any allegation that Flanagan had "demanded" her attendance at his house. Flanagan then objected and was overruled.

Even if we were to assume that there was improper testimony before the review council regarding nonconsensual sexual relations, Flanagan bears the burden of proving that he was "substantial[ly] . . . prejudiced" by the testimony. *Tomlin v. Personnel Appeal Board*, 177 Conn. 344, 348, 416 A.2d 1205 (1979). He cannot meet this burden. The same review council that conducted the formal hearing had already heard and rejected extensive testimony from Ross at the probable cause hearing regarding her claims of rape and coercion. The brief, fragmentary, additional testimony from Ross at the formal hearing concerning nonconsensual sexual relations could not conceivably have resulted in substantial prejudice to

Flanagan.[24] Ross was simply not credible on this aspect of her complaint and it is obvious that the review council so found.

VI

We turn finally to Flanagan's substantive claim. He argues that, as a matter of law, it is not a violation of either canon 1 or 2A for a judge to have had a three and one-half year consensual affair with a married court reporter regularly assigned to his courtroom over the course of the affair. We disagree. We conclude that his conduct was in violation of canons 1 and 2A, and that public censure, the least severe of the possible sanctions, is appropriate.

Canon 1 provides that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective." Canon 2A provides that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The official commentary to canon

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[24] Flanagan does not challenge the review council's authority to conduct both the preliminary investigation to determine probable cause and the formal hearing. In any event, such due process claims have been routinely rejected. See, e.g., *In re Elliston*, supra, 789 S.W.2d 472; *In the Matter of Deming*, supra, 108 Wash.2d 105.

2, approved and adopted by the judges of the Superior Court, provides in relevant part: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. The judge must expect to be the subject of constant public scrutiny. The judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by ordinary citizen and should do so freely and willingly. . . . " When examining a judge's conduct, we must consider "the impact it might reasonably have upon knowledgeable observers." *In re Zoarski*, supra, 227 Conn. 792. We are persuaded that a judge's three and one-half year affair with a married court reporter who regularly had been assigned to his courtroom is conduct properly prohibited by canons 1 and 2A because it reasonably could lead a knowledgeable observer to question the integrity of the judiciary and to lose confidence therein.

"Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. . . . There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. . . . Judges must assiduously avoid those contacts which might create even the appearance of impropriety." (Citation omitted.) *In the Matter of Lonschein*, 50 N.Y.2d 569, 572, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980). "The duty to avoid creating an appearance of impropriety is one of taking 'reasonable precautions' to avoid having 'a negative effect on the confidence of the

thinking public in the administration of justice.' *In the Matter of Bonin*, 375 Mass. 680 [706-707, 378 N.E.2d 669] (1978)." *In re Inquiry Concerning a Judge*, supra, 788 P.2d at 723.

In concluding that Flanagan's relationship with Ross constituted a violation of canons 1 and 2A, we rely on the combination of elements present in this case: (1) Ross was a subordinate of Flanagan's working regularly in his courtroom and appearing on many occasions in his chambers under circumstances in which one would not normally expect the court reporter to be present; and (2) she was a married woman. Flanagan has emphasized to this court that adultery is no longer a crime in Connecticut and therefore it is not conduct for which a judge may be censured. While it is true that adultery is no longer a criminal offense, the mere fact that conduct is less than criminal does not mean that, if a judge engages in it, he may not diminish public confidence in the judiciary. A judge's conduct is held to a higher standard than that of the average citizen, and must be beyond reproach, at least when that conduct is directly connected to his professional office and functions. Although it may be difficult to assess the degree to which the public at large now may condone or disapprove of one having a sexual affair with a married person, we are persuaded that, in general, such conduct is regarded as improper when it involves a subordinate in a professional, highly sensitive public context. Moreover, we think it is fair to say that a member of the public, aware of the aforementioned combination of factors, would reasonably conclude that the integrity of the

judiciary was likely to be impaired.[25] We conclude that public confidence in the integrity of the judiciary is compromised by extended sexual relationships between judges and married court reporters assigned to their courtrooms.

Flanagan notes that in 1991, a proposal was made to amend the official commentary to read, in part, that "[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional *and personal* conduct of a judge." (Emphasis added.) Proposed New Code of Judicial Conduct, Connecticut Law Journal, Vol. 52, No. 44 (April 30, 1991). He argues that because the judges failed to adopt that proposal, personal conduct may never form the basis for a violation of canon 2A. Without deciding the merits of that claim, we note that the conduct in this case involved a relationship with a subordinate employed daily in his courtroom. Therefore, this was not purely personal conduct, because it took place with a person with whom Flanagan had an ongoing, daily professional relationship. Indeed, as the review council's findings indicate, Ross not only served as the court reporter in Flanagan's courtroom, but "on many occasions [she] was present in [Flanagan's] chambers before the opening of court, during pretrial conferences with counsel present and during recesses," occasions when one would not normally expect

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[25] For instance, such a person could, we believe, reasonably conclude that there was an impermissible *risk* of Ross' failing to render an accurate record of the proceedings in Flanagan's courtroom – either *because* of their relationship or because of an acrimonious termination of that relationship.

that the court reporter would be present. Thus, the risk of injury to public confidence in the integrity of the judiciary is substantially heightened in this instance as opposed to a case where the affair was with a person unconnected with his daily activities as a judge of the Superior Court. See *In re Miera*, supra, 426 N.W.2d 855-56 (distinguishing between sexual advances toward personal friend as opposed to court reporter).

In fairness to Flanagan, we must emphasize that there was absolutely no evidence in this case that any matter before him was ever actually compromised or mishandled in any way. Rather, the evidence adduced at both the probable cause hearing and at the formal hearing indicates that Flanagan was a conscientious, fair minded and widely respected judge in the eyes of his peers as well as those who appeared before him. While such an otherwise exemplary record is certainly relevant to the determination of the appropriate sanction to be imposed, it is not a defense to a violation of the canons of the Code of Judicial Ethics. *In the Matter of Greenfield*, supra, 76 N.Y.2d 297. We conclude that, under all the circumstances of this case, the review council appropriately imposed public censure on Flanagan pursuant to § 51-51n (a) for a violation of the Code of Judicial Conduct.

The decision of the review council is affirmed.

In this opinion the other justices concurred.

SUPREME COURT

STATE OF CONNECTICUT

S.C. NO. 15419	:	JUDICIAL REVIEW
240 CONN. 157	:	COUNSEL
	:	
IN RE: HON. ROBERT	:	HARTFORD
C. FLANAGAN	:	
	:	MARCH 27, 1997

MOTION FOR REARGUMENT

The Respondent, Hon. Robert C. Flanagan, respectfully moves for a reargument of the decision of the Court published March 18, 1997, Connecticut Law Journal, 240 Conn. 157. The grounds for moving for reargument are as follows:

I. THE COURT ERRED IN FAILING TO ADDRESS THE RESPONDENT'S CLAIM THAT THE JRC CHARGED HIM WITH CONDUCT WHICH WILFULLY VIOLATED CANON 1 IN VIOLATION OF SECTION 51-51i(a)(2), C.G.S. AND IN A WILFUL VIOLATION OF CANON 2A IN VIOLATION OF SAID C.G.S. SECTION 51-51i(a)(2).

In his Statement of the Issues the Respondent claimed the JRC erred by:

> 2. FINDING THAT THE CONSENSUAL RELATIONSHIP BETWEEN THE RESPONDENT AND THE COMPLAINT CONSTITUTED A *WILFUL* VIOLATION OF CANONS 1 AND 2A IN *VIOLATION* OF C.G.S. SECTION 51-51i(a)(2)

3. FINDING THE RESPONDENT *WILFULLY* VIOLATED C.G.S. § 51-51i(a)(2) WHEN THE ONLY *ALLEGATION* INVOLVED A VIOLATION OF THAT WHICH WAS NOT ADOPTED BY THE JUDGES, PERSONAL CONDUCT. [APPENDIX A].

The JRC judicially admitted that the Respondent was charged, pursuant to C.G.S. §51-51i(a)(2), with a *wilful* violation of the Canons, as set forth in its counterstatement of the issues. [APPENDIX B].

4. COULD THE COUNCIL HAVE REASONABLY DETERMINED THAT THE RESPONDENT JUDGE HAD "*WILFULLY*" VIOLATED CANONS 1 AND 2A OF THE CODE OF JUDICIAL CONDUCT." [Emphasis added]

The only charges lodged against this Respondent were the allegation that pursuant to C.G.S. §51-51i(a)(2) that he *wilfully* violated Canons 1 and 2A.

This Court, however, in direct contravention of the aforesaid judicial admission of the JRC that it charged the Respondent with *wilful* violations of the Canons, has decided this case on charges not lodged against the Respondent. This Court has decided this case on facts which this Court admits cannot support *wilful* violations of the Canons. Therefore the conduct alleged, Id. 162-Fn 2, which the council found, Id. 164 (10), which Flanagan assigned as error, Id. 164 (3); is admitted by this Court *not* to be a wilful violation of the Canons, Id. 182-184, particularly when this Court states: "To require that a judge subjectively have known that his conduct was in violation of the Canons of Judicial Conduct makes it extremely difficult, if not impossible, to discipline a judge pursuant

to C.G.S. §51-51i(a)(2) for violating those Canons." Id. 164, ¶ 3.

Respectfully, the allegation against the Respondent's that he wilfully violated the Canons, as judicially admitted by the JRC, is indeed admitted by this Court in that quotation. The Respondent did not select those charges. The JRC *chose* to charge the Respondent under C.G.S. 51-51i(a)(2) rather than, as it certainly could have elected to so charge, with a violation of C.G.S. §51-51i(a)(1):

> "(1) conduct prejudicial to the impartial and effective administration of justice which brings the judicial office in disrepute."

Nevertheless the JRC chose *not* to so charge. It charged the Respondent with:

> "(2) *wilful* violation of . . . any Canon of judicial ethics."

The JRC admits it charged the Respondent with a *wilful* violation of Canons 1 and 2A. This Court must decide this case as the case is presented to it (i.e., did the Respondent *wilfully* violate the Canons).

On pages 167 and 169 this Court approvingly has cited *In re Miera*, 426 N.W. 2d 850 (Minn 1988). Critically and conspicuously unlike the instant case that case examines the propriety of unwelcome sexual advances, unwelcome sexual advances in the courthouse and in the clerk's office, which the Supreme Court of Minnesota found not to be a wilful violation of the Canons. *Id.* 856. Similarly to the *Miera* court, *Id.* 856, this Court may find the Respondent's conduct inappropriate, but not a wilful violation of the Canons.

For this Court to change C.G.S. §51-51i(a)(2) from "(2) *wilful* violation of . . . any Canon of Judicial ethics . . . ", so that it reads "a violation of any Canon of Judicial ethics", so manifestly changes the charges lodged against the Respondent, for the first time on *appeal*, is far more egregious than the conduct of the grievance committee in *Ruffalo*, which added a charge against the Respondent in the ajudicarty stage of the proceedings. *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2 117 (1968). It is more egregious because this Court has in effect instituted a new charge against this Respondent by emasculating the statute under which this Respondent was charged, C.G.S. §51-51i(a)(2). That statute as written requires, and this is judicially admitted by the JRC, a *wilful* violation of the Canons. That is the plain language of that statute.

This Court has cited *Patterson v. Counsel on Probate Judicial Conduct*, 215 Conn. 553 in support of its position as to wilfulness. That case specifically conceded there *was no intentional act* by the *judge*, Id. 565. It is inapposite to the instant case. Further, *In re Zoarski*, 227 Conn. 784, 791 holds:

> "In contrast to §51-51i(a)(2), prejudicial judicial conduct under §51-51i(a)(1) *does not require proof of a wilful violation of the Canons of ethics.*" [Emphasis added]

Respectfully, contrary to what this Court cites, *Zoarski* to say, the aforesaid requires " . . . proof of a wilful violation of the Canons of Judicial ethics" under §51-51i(a)(2). Respectfully, the change urged by this Court should be left to the legislature; it violates *Ruffalo* for this Court to insert the change of charges on appeal.

II. THIS COURT ERRED IN FINDING A VIOLATION OF CANONS 1 AND 2A IN VIOLATION OF C.G.S. §51-51i(a)(2) DOES NOT REQUIRE EXPERT TESTIMONY.

On pages 178 through 181 this Court has cited *In re Zoarski*, supra, and *Levinson v. Board of Chiropractic Examiners*, 211 Conn. 508, 525, as the foundation for its holding that expert testimony is not required in the instant case. These cases do not support the holding that expert testimony *is* required, they hold that expert testimony is required in the absence of a *majority* of the *panel being experts*.

In re Zoarski, Id. 793-794 held:

> "The membership of the Council included three lawyers as well as three judges and together these members constituted a *majority* of the council . . . It is reasonable to suspect lawyers to have a special understanding of the ethical standards that cover judges." [Emphasis added]

This Court, therefore, must admit *Zoarski* had a majority of experts. So too, *Levinson*, supra, page 525:

> "As long as the board hearing in deciding a licensing matter is composed of a [sic] least a *majority of experts in the field* involved in the case, the board may rely upon its own expertise in valuating charges against persons licensed by the board and the requisite standard of care by which to judge such cases." [Emphasis added]

Jutkowitz v. Department of Health Services, 220 Conn. 86, 110-112 holds:

> "As long as the board hearing and deciding a licensing matter is *composed of at least a majority*

> *of experts* in the field involved in the case, the board may rely upon its own expertise in evaluating charges against persons licensed by the board and the requisite standard of care." [Emphasis added]

All of the above cases require expert testimony in the absence of a majority of experts on the panel. The JRC impliedly concedes expert testimony is necessary in the case because it ruled the expert opinion of Professor Nancy J. Moore of the State University of New Jersey to be admissible. She opined the actions of Flanagan did not violate even the ABA model code, the personal conduct section of which was *not* adopted by the judges of the State of Connecticut, let alone our Canons. If expert testimony were not needed, the JRC would have not admitted that evidence. However, in admitting that expert opinion, the JRC conceded that the area is beyond the ken of the average trier of fact. The JRC further admitted, if this Court will be kind enough to read pages 21 through 26 of the JRC brief, that prior precedent required expert testimony, but now the JRC, in essence, asked this Court to ignore that prior precedent and not to require expert testimony in this case.

Respectfully, *Santopietro v. New Haven*, 239 Conn. 207 (1996) specifically does address the standard of care required of an umpire, and it holds that expert testimony is required in that case. The issue of the necessity of an expert to establish the standard of care equally applies to this case because the wilful violation of the Canon is beyond the ken of a trier of fact, and, therefore, expert testimony is necessary. Every case in Connecticut, absent a majority of the board being *experts*, requires expert

testimony as to the standard of care of experts. Even *Santopietro*, supra, requires reversal of this case for lack of expert testimony.

III. THIS COURT ERRED IN NOT SUSTAINING THE APPEAL AND DISMISSING THE COMPLAINT AGAINST THE RESPONDENT BECAUSE OF THE WILFUL, FLAGRANT, MALICIOUS VIOLATION OF C.G.S. §51-51l(a) BY THE COMPLAINT

Despite the chairperson of the JRC twice ordering the Complainant not to divulge her testimony as the proceedings were confidential, and this Court's failure to dismiss the complaint and its opinion on pages 184 through 186 rewards the Complainant for a wilful violation of that statute, and sends a message to all who testify in the probable cause stage that they need not obey the confidentiality statutes or the oath. In essence, this Court's failure to so dismiss undermines the integrity of both the JRC hearings and the oath in general.

This Court cites *In re Zoarski*, supra, that *Zoarski's* argument was unpersuasive because he had not proved, *or* even alleged that the lack of confidentiality breaches in that case had effected the fairness of the Review Council's deliberations in any way. It is important to note that in *Zoarski*, 794-795, the quotation this Court used was: "In the absence of allegations *or* proof that Stuart Soffer's public disclosures had any impact whatsoever on the fairness of the council's deliberations, dismissal of the charges was not required." Notice the use of the disjunctive. As the Record indicates, pages 8 through 18, the

allegations certainly were made in the instant case. That is all that is required under *Zoarski,* Id.

Zoarski Id, does *not* put the unrealistic and practicably impossible burden on the party claiming prejudice to prove prejudice; how, as a matter of practicality, would one sustain such an onerous other than by placing the triers on the stand and forcing them to admit that they were prejudiced by hearing inadmissible testimony which form the basis of their opinions. Rather, fairness and substantial justice would shift the burden from the party claiming prejudice, once he sustains the burden of showing the admission of clearly prejudicial inadmissible evidence to his opponent, so that the opponent, by clear and convincing evidence, must prove that the admission of that evidence was harmless error. (See *Asherman v. State,* 202 Conn. 429, 442 (1987)). As a matter of fact, the proof of the effect of this Complainant's blatant disregard of the law so impacted on the JRC that it denied the Respondent's Motion in Limine to restrict the testimony of consensual sex, despite the fact that no opposition papers were filed against that motion by the JRC. After hearing the Complainant testify as to utterly inadmissible, untruthful and unbelieved testimony, the JRC ultimately struck that testimony, as if it can unwring [sic] the bell. The JRC attempted to justify that action on page 29 of its brief:

> "In the absence of any *allegation* now *or* proof that [these] public disclosures had any impact whatsoever on the fairness of the council's deliberations, dismissal of the charges was not required." [Emphasis added]

citing *James H. Kinsella*, 193 Conn 180, 201-04 (1984). But this Respondent did make those allegations, and the case should have been dismissed. As hereinbefore set forth, the refusal to sustain the Respondent's motion in limine, the overruling of his objection to forced sex/rape, and the reversing of that ruling, certainly indicate that there was an "impact" on the fairness of the council's deliberations. Simply put, it was pressured, and it succumbed to that pressure.

Therefore, this Court's admonition that is incumbent upon the Respondent to *allege* the public disclosure violation is more than satisfied, and to require the Respondent to place each member of the council under oath and expect them to admit that they were cowered sets forth an illogical, impossible task. As this Court has asserted that it has done a searching review of the Record, it is difficult to understand why this Court does not dismiss the complaint for the wilful violation of §51-51i.

IV. THE COURT ERRED IN ITS HOLDING THAT ALTHOUGH THE DISBELIEVED EVIDENCE OF THE COMPLAINANT THAT THERE WAS A NON-CONSENSUAL SEXUAL RELATIONSHIP WITH THE RESPONDENT SHOULD HAVE BEEN EXCLUDED FROM THE FORMAL HEARING BEFORE THE REVIEW COUNCIL, THAT THE RESPONDENT FAILED TO SUSTAIN HIS BURDEN OF PROVING THAT HE WAS HARMED BY THE ADMISSION OF SUCH EVIDENCE.

Because these proceedings are quasi-criminal in nature, p. 174, and because the unopposed motion in limine to preclude non consensual sexual testimony was

denied, and because, over objection, non consensual, completely disbelieved allegations by the Complainant were reiterated and reiterated, and after the bell was wrung [sic], the JRC then stated it would strike all of false, the non-consensual testimony, and, despite the claimed striking of the testimony again, this Court found that other non consensual untrue allegations testimony was made, "Flanagan then objected and was overruled." Id. 187. Does any person think that the Respondent was not harmed by this highly flammatory, inadmissible testimony? Justice Borden, at oral argument, was appalled that such conduct took place, stating it would never be permitted to take place in a jury case. And this, in effect, *is a jury case.* The make up of the council is one half lay persons, one quarter judges, and one quarter lawyers. The disability of permitting such testimony in a jury case is present when there is no majority of experts on the panel, particularly when there was no expert testimony as to the standard of care. It must be understood that two of the three judges voted not guilty; the lawyer on the panel who does the most trial work, indeed is constantly on trial, voted not guilty with a dissent. All six lay people voted guilty despite a lack of expert opinion and, despite the axim that the bell cannot be unwrung [sic]. Is not that harmful, prejudicial error which requires the appeal to be sustained and the case dismissed.

V. THIS COURT ERRED IN FINDING THAT IN RE RUFFALO WAS NOT VIOLATED AND IN FINDING THAT THERE WAS A WAIVER.

The probable cause hearing terminated on February 28, 1996. The Respondent's eight year term expired on

March 8, 1996. The so-called "waiver" letter set forth on page 172, note 19, second from last paragraph, requested a recommendation from the JRC to the governor that the Respondent be reappointed.

The JRC set a hearing for April 16, 1996, more than five weeks subsequent to the termination of the Respondent's eight year term. What choice did the Respondent have but to ask for a favorable recommendation and agree, with a man's property rights in dire jeopardy, to the unreasonable time scheduling by the JRC? That hardly seems to be a "waiver", the voluntary relinquishment of a known right.

Further, *In re Ruffalo* is directly in point. This Court must understand that *Ruffalo* was tried in the District Court, 249 Fed. Sup. 432, on the transcript of the state court proceedings. The District Court found no violation. The Court of Appeals reversed, 370 Fed. 2d. 447 (1966), utilizing those same stipulated facts.

The unfairness of starting the proceedings in the federal court by adopting the state evidence, is analogous to the confidential proceedings which should have been resolved in a not guilty, end of the case resolution for the instant Respondent. The United States Supreme Court, *In Re Ruffalo,* 390 U.S. 544, found a violation of the notice provisions and reversed the "conviction". That is exactly what is mandated in the instant case.

The situation in the instant case, by this Court's changing, after two sets of charges [the probable case proceeding and the public proceeding] the statute upon which he was tried, is more damaging than the adding of charges at trial, as there is no chance to meet these

charges when they were not present during the appeal process. The statute upon which it is judicially admitted that the Respondent was charged, that all the evidence was directed at, stated: "a judge shall be subject . . . to censure . . . for . . . (2) wilful violation of . . . any Canon of judicial ethics". To discover on appeal that the statute has been changed to read: "a judge shall be subject . . . to censure . . . for . . . (2) . . . violation of any Canon of judicial ethics, is violative of this Respondent's federal and state constitutional rights of due process, deprivation of property rights without due process of law and a violation of the equal protection of law."

Respectfully, *Ruffalo,* supra, has been violated and the motion to reargue should be granted and the relief sought, a dismissal of the charges is mandated.

THE RESPONDENT,

BY _____

ROGER J. FRECHETTE
JURIS #20847
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NEW HAVEN, CT 06511
TEL. NO. 203-865-2133

[FLANAGAN'S] ISSUES [PRESENTED ON APPEAL]

In a statutory proceeding before the Judicial Review Council, did the Council err:

1. In finding that the consensual relationship between the Respondent and the Complainant constituted a wilful violation of Canons 1 and 2A of the Code of Judicial Ethics in violation of C.G.S. § 51-51i(a).

2. In finding the Respondent guilty of the aforesaid when there was no expert testimony to establish the standard and the breach thereof.

3. In finding the Respondent *wilfully* violated C.G.S. § 51-51i(a)(2) when the only *allegation* involved a violation of that which was not adopted by the Judges, personal conduct.

4. In failing to dismiss the charges because of the Complainant's deliberate breach of the confidentiality requirement of the statute which, in violation of *In re Zoarski*, 227 Conn. 784 (1993), resulted in prejudice to the Respondent.

5. In failing to dismiss the complaint at the termination of the probable cause hearing wherein the Respondent was charged with rape/forces [sic] sex, and the Council explicitly cleared him of those charges.

6. In its rulings on the Motion in Limine and evidential matters.

[JUDICIAL REVIEW COUNCIL'S]
COUNTERSTATEMENT OF THE ISSUES

1. Could the Council Have Reasonably Found That The Respondent Judge Had Engaged In A Consensual Sexual Relationship With The Complainant?

2. Did the Council Properly Charge The Respondent Judge With Engaging In A Consensual Sexual Relationship With The Complainant After Investigating Her Complaint And Holding A Probable Cause Hearing?

3. Could the Council Have Reasonably Determined That The Respondent Judge Had "Wilfully" Violated Canons 1 And 2A Of The Code Of Judicial Conduct?

4. Did The Complainant's Alleged Breaches Of Conn. Gen. Stat. § 51-51*l* Prejudice The Respondent Judge?

5. Did The Council Commit Reversible Evidentiary Error In Ruling On The Respondent Judge's Objections To Evidence Of The Complainant's Allegations?

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 15419

IN RE HON. ROBERT C. FLANAGAN : APRIL 24, 1997

ORDER

THE MOTION OF THE RESPONDENT, FILED MARCH 31, 1997, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **DENIED.**

BY THE COURT,

/s/ Francis J. Drumm
CHIEF CLERK

NOTICE SENT: APRIL 24, 1997
FRECHETTE & FRECHETTE
DONALD B. CALDWELL
CAROLYN K. QUERIJERO,
ASSISTANT ATTORNEY GENERAL
GREGORY T. D'AURIA,
ASSISTANT ATTORNEY GENERAL
HON. R. BARTLEY HALLORAN, CHAIRPERSON
RJD

[PROPOSED AMENDMENTS]

State of Connecticut

JUDICIAL DEPARTMENT
OFFICE OF THE CHIEF COURT ADMINISTRATOR
Drawer N, Station A
Hartford, Connecticut 06106

566-3835

June 25, 1991

MEMO TO: Supreme Court Justices
Appellate Court Judges
Superior Court Judges
Senior Judges
State Trial Referees
Family Support Magistrates

SUBJECT: Proposed New Code of Judicial Conduct

Judge Aaron Ment, Chief court Administrator, has asked me to forward to you for your information the attached Code of Judicial Conduct which is proposed by the Superior Court Rules Committee. This proposed new Code, which is based on the American Bar Association's 1990 Model Code of Judicial Conduct, was printed in the April 30, 1991 issue of the Connecticut Law Journal.

/s/ Carl E. Testo
Carl E. Testo, Esq.
Director, Legal Services

CET:pt
Attachment

cc: Hon. Aaron Ment

PROPOSED NEW CODE OF JUDICIAL CONDUCT

It is proposed that the following, which is based on the American Bar Association's 1990 Model Code of Judicial Conduct, be adopted in place of the current Code. Appendix A herein contains revisions to the ABA Model Code which are proposed by the American Judicature Society.)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The use of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial offices as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific acts set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text says "shall" or "shall

not," it is intended to impose binding obligations the discretion of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion as depending on the context, it refers to action that is not covered by separate proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and constitutional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. it is not designed or intended as a basis for civil liability of criminal prosecution. Furthermore, the purpose of the Code would be substantial if the Code were invoked by lawyers for mere tactical advantage in the proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every regression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the

improper activity on others or on the judicial system. See ABA Standards Relating to judicial discipline and Disability Retirement.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

[PROPOSED CANONS AND COMMENTS]

Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is

maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to b the subject of constant public scrutiny. a judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. [Emphasis added] [Not adopted, see App. 65 - App. 67]. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for

appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

[CODE ADOPTED BY STATE OF CONNECTICUT JUDGES]

Practice Book Revisions

Superior Court

Code of Judicial Conduct

Effective March 16, 1993

NOTICE

SUPERIOR COURT

Notice is hereby given that on February 25, 1993, the judges of the Superior Court adopted the revisions to the Practice Book which are contained herein, to take effect March 16, 1993.

Attest:

CARL E. TESTO, ESQ.
Director of Legal Services

REVISIONS TO THE CODE OF JUDICIAL CONDUCT

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All [His] *the Judge's* Activities.

A. A judge should respect and comply with the law and should [conduct himself] *act* at all times in a manner

that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow [his] *the judge's* family, social, or other relationships to influence his *or her* judicial conduct or judgment. [He] *The judge* should not lend the prestige of [his] *judicial* office to advance the private interests of others: nor should [he] *the judge* convey or permit others to convey the impression that they are in a special position to influence him *or* her. [He] *The judge* should not testify voluntarily as a character witness.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. [He] *The judge* must expect to be the subject of constant public scrutiny. [He] *The judge* must therefore accept restrictions on his *or her* conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of [his] *judicial* office into the proceeding in which [he] *the judge* testifies and may be misunderstood to be an official testimonial. This Cannon, however, does not afford [him] *the judge* a privilege against testifying in response to an official summons.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons

information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

JUDICIAL REVIEW COUNCIL

RE:	:	J95-057
HONORABLE ROBERT C. FLANAGAN	:	FEBRUARY 26, 1996

MOTION TO DISMISS

"[C.G.S. §]51-51l(a) . . . provides for the confidentiality of investigations to determine 'whether or not there is probable cause that conduct under section 51-51i has occurred . . . " *In Re: Zoarski,* 227 Conn. 784 (1993). 794 (1993). The Complainant has attempted to circumvent the confidentiality of these proceedings. The complainant has disclosed her complaint to the Hartford Courant, and is attempting to influence this Council's decision in this matter by speaking with a reporter for the new Haven Register after she gave testimony to this Council, when she knew, or knew with substantial certainty, that the allegations she made to the reporter would result in substantial and highly prejudicial publicity against Judge Flanagan, which publicity is designed to influence this Council's decision on probable cause.

BACKGROUND

The complainant testified before this Council on Thursday, February 15, 1996. At that time, she took an oath of confidentiality which was administered by the Executive Director. Near the very end of the complainant's testimony, the Chairman said to the complainant the following:

> Okay, thank you Ms. Ross. *I would just remind you that these proceedings here are confidential and I'd ask you not to discuss these proceedings with anyone outside of this hearing. Do you have any questions about that?* (See, transcript, p. 152)

Judge Flanagan's counsel then asked the complainant how the Hartford Courant obtained the story about her complaints against Judge Flanagan. The complainant, in response, stated that she initially *refused* to even speak to the reporter " . . . [from]/for November, December, for January, probably to mid January *when I finally couldn't get a police department of the Chief State's Attorney to take a complaint. I [and Judge Flanagan wishes this Council to note the complainant's use of the first person] asked [the reporter] if she would, I would be willing, because she needed two sources to be able to print something, I said I'd be willing to give her the second yes, that's true, yes, that's true.* In order – and she took the letter to John Baily although I had typed to him asking him. And as soon as – *that day I went to her,* the next day John Baily called me. *But I had to go that far* to get them to even help me." (See, transcript, p. 153). (A copy of the Hartford Courant article dated January 20, 1996, is attached as "Exhibit 1").

The complainant, then, knows how to use the media to pressure public officials. She testified before this Council that she initially refused to speak with the media regarding her complaint to this Council from November, December and part of January. It was only when she states that she needed the media in order to pressure the Chief State's Attorney that *she, the complainant, sought out the reporter for the Hartford Courant,* in order to get the Chief State's Attorney to "take a complaint". This is the

complainant's sworn testimony before this Council. Immediately following this testimony, the last thing the Chairman said to the complainant was:

> Okay, with that I will say finally thank you very much. *This proceeding is confidential.* (See, transcript, p. 155)

Attached is a front page article from the New Haven Register dated Wednesday, February 21, 1996. (Exhibit 2). The article states that the complainant was interviewed at her home by the reporter on Tuesday, presumably the previous day, February 20, 1996. The undersigned represents that the same reporter called the undersigned at 5:57 p.m. on Tuesday, February 20, 1996 purportedly from the complainant's home, seeking a comment. On the day of the aforesaid article, and in the following days, the complainant's allegations have received further publicity on radio, television and in the newspapers.

ARGUMENT

The complainant has admitted to using the media in order to influence a public official. She sought out and gave to the Hartford Courant confirmation as a "second source", without which the reporter would not have published the story concerning the complainant's complaint to this Council. This is the same complaint that is before this Council. (The complaint filed with the affirmative action commission, as appears in the Council's file, was simply attached to the Judicial Review Council's Complaint Form, and sworn to by the complainant. It forms the *entire* complaint before this Council).

As reflected in the Register article, the complainant has *again* given to the news media a copy of the same affirmative action complaint. She has also revealed to the same reporter a copy of the sworn affidavit filed with the Chief State's Attorney dated January 22, 1996. This is, apparently, the same affidavit which the complainant submitted to this Council. It can also be reasonably inferred from the Register article that the complainant disclosed the fact that she has filed a complaint with this Council. This public disclosure of the complaint before this Council is expressly prohibited by C.G.S. § 51-51l(a). (See, *Kamasinski v. Judicial Review Council,* 44 F.3d 106, 111 (2nd Cir. 1994). (A copy of *Kamasinski* is attached as "Exhibit 3").

The complainant's disclosures to the media are clearly an attempt by her to use the " 'bully pulpit' " to inflamed public opinion an [sic] against the respondent and thereby influence this Council. See, *Kamasinski,* at 111). Moreover, the complainant is again attempting to circumvent the confidentiality or these proceedings by using the media " . . . as a means to amplify and legitimate [her] claim [before this Council]." *Doe v. State of Fla. Judicial Qualifications Com'N, [sic]* 748 F. Supp. 1520, 1527 (S.D. Fla. 1990). One of the central reasons for the confidentiality of these proceedings is that it guarantees the impartiality of the Council's deliberations and its decision making process. In articulating the importance of the confidentiality of the Council's proceedings, the *Kamasinski* court cites with approval Justice Scalia's concurrence in the Supreme Court case of *Butterworth v. Smith,* 494 U.S. 624, 636-637 (1990). In *Butterworth,* Justice

Scalia articulates one of the central reasons for the inviolability of confidentiality:

> [Confidentiality] helps to assure . . . that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism *to which they cannot respond. To allow them to respond, on the other hand – by denying that the witness in fact said what he claims to have said, or by pointing out the contradictory testimony of other witnesses – would have its own adverse effects,* including the subjection of grand jurors to a degree of press attention and public prominence that might in the long run *deter citizens from fearless performance of their grand jury service.* [Emphasis added].

The confidentiality of the proceedings are a shield, therefore, for the decision makers from public criticism of their decision. Moreover, one sided disclosures to the media by the complainant leave the public with a skewed and biased version of the events in question. A version highly prejudicial to Judge Flanagan, and in turn favorable of the complainant. The complainant has admitted to this Council that she has previously used the media for her own ends to influence the Chief State's Attorney. The end result of these one sided disclosures is to pressure this Council, by inflaming the media and public opinion against Judge Flanagan, into finding probable cause against Judge Flanagan. It is important to remember that the media does *not* and cannot hear the testimony of all of the witnesses who have, *or will,* testify before this Council. One sided disclosures by the complainant, therefore, are clearly designed to influence this Council's deliberations.

Because of the aforesaid public disclosures by the complainant, the fairness of the Council's deliberations has been compromised. A fair and compelling inference which should be drawn from the complainant's public disclosures is that she is using the media in order to influence the Council's deliberations. Under these circumstances dismissal of the charges it warranted. (See, *Zoarski*, at 694-795).

WHEREFORE, the respondent respectfully moves that the charges be dismissed, and a finding of no probably cause enter.

THE RESPONDENT

BY /s/ ROGER J. FRECHETTE
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FILE NO.: J 95-057	:	JUDICIAL REVIEW COUNCIL
IN RE: HON ROBERT C. FLANAGAN	:	HARTFORD, CONNECTICUT
	:	APRIL 15, 1996

MOTION IN LIMINE

The respondent respectfully moves that the evidence presented at the public hearing to be held on April 17, 1996, pursuant to C.G.S. §51-511, be restricted to the charge that The Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee between March 1, 1992 and October 30, 1995. Any allegations by the Complainant that the relationship between the respondent and her was anything other than consensual is outside the scope of Charges 1 and 2, and are therefore irrelevant, improper and highly prejudicial to the Respondent. Any evidence concerning matters for which the Respondent has not been charged should, therefore, be excluded.

LEGAL ARGUMENT

The respondent has been charged with the violation of Canon 1 and Canon 2A of the Code of Judicial Conduct for engaging in a consensual sexual relationship with a married court employee. In reliance on these Charges as alleged by the Council, the respondent is prepared to defend himself at the public hearing scheduled for April 17, 1996. The respondent obviously cannot mount a defense

* * *

* * *

HEARING RE: HONORABLE ROBERT C. FLANAGAN
APRIL 17, 1996

CROSS EXAMINATION OF SHEPARD SHERWOOD

CROSS EXAMINATION

BY MR. FRECHETTE:

Q Isn't it so, Mr. Witness, from a party in December of 1994 through the early fall of 1995 you and Ms. Ross engaged in a sexual relationship, the result of which she accused you of fathering her aborted child?

A I refuse to answer that question.

MR. R. FRECHETTE: I claim the question.

A I don't think that's relevant.

* * *

HEARING OFFICER HALLORAN: I'd like to discuss this in executive session for a few minutes.

(Whereupon the Council adjourned into executive session from 5:03 p.m. until 5:07 p.m.)

HEARING OFFICER HALLORAN: Going back on the record, the objection is overruled. You're ordered to answer the question. Do you need the question repeated?

THE WITNESS: No. Yes.

MR. R. FRECHETTE: I have no further questions of the witness.

* * *

J 95-057	:	JUDICIAL REVIEW COUNCIL
IN RE: HONORABLE ROBERT C. FLANAGAN	:	HARTFORD, CONNECTICUT
	:	APRIL 19, 1996

DISSENT TO DECISION IN RE:
HONORABLE ROBERT C. FLANAGAN

Having found at the Hearing in Probable Cause that the sexual relationship between Judge Flanagan and Ms. Penny Ross was consensual, the Council nonetheless filed two charges in this case against the Judge, which were the subject of a public hearing on April 17, 1996. Both charges alleged Judge Flanagan "engaged in a consensual sexual relationship with a married court employee" for a period lasting approximately 3½ years. In his Answer and at the public hearing, Judge Flanagan, a bachelor, admitted the relationship but denied the charge that it violated the canons and statutes pled in the charges.

No case was cited to the Council which held that a consensual sexual relationship between a judge and a court employee (married or unmarried) violated any canon or statute. Neither is there any written guideline or policy of the Judicial Department prohibiting same.

The applicable standard of proof in cases such as these is clear and convincing evidence. No evidence was introduced that the relationship in any way affected any judicial decision made, the movement of the court docket, or the job performance of Judge Flanagan.

Probing into the personal lives and conduct of judges – where there is no evidence of any adverse impact on

judicial performance – is a dangerous and slippery slope. The Council cannot and should not impose its own personal moral code on judges who come before it.

The evidence offered at the hearing did not approach the high standard of proof required to find Judge Flanagan "guilty." Accordingly, I dissent from the majority vote and vote "not guilty" on both charges.

/s/ Hugh F. Keefe
HUGH F. KEEFE
MEMBER
APRIL 19, 1996

JUDICIAL REVIEW COUNCIL DECISION

* * *

DECISION

Charge 1

The conduct of the respondent, as found above, resulted in his failure to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved.

On motion made and seconded, on a vote of nine to three, the Judicial Review Council found the respondent guilty as charged in Charge 1.

Charge 2

The conduct of the respondent, as found above, resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

On motion made and seconded, on a vote of nine to three, the Judicial Review Council found the respondent guilty as charged in Charge 2.

JUDICIAL REVIEW COUNCIL

/s/ R. Bartley Halloran
R. Bartley Halloran
Chairman

§ 51-51i. Grounds for removal, suspension and censure

(a) In addition to removal by impeachment and removal by the governor on the address of two-thirds of each house of the general assembly as provided in the Connecticut constitution, a judge shall be subject, in the manner and under the procedures provided in this chapter to censure, suspension or removal from office for (1) conduct prejudicial to the impartial and effective administration of justice which brings the judicial office in disrepute, (2) willful violation of section 51-39a or any canon of judicial ethics, [emphasis added] (3) willful and persistent failure to perform his duty, (4) neglectful or incompetent performance of his duties, (5) final conviction of a felony or of a misdemeanor involving moral turpitude, (6) disbarment or suspension as an attorney-at-law, (7) willful failure to file a financial statement or the filing of a fraudulent financial statement required under section 51-46a, or (8) temperament which adversely affects the orderly carriage of justice.

(b) In addition to removal by the governor for cause pursuant to subsection (f) of section 46b-231, a family support magistrate shall be subject, in the manner and under the procedures provided in this chapter to censure, suspension or removal from office for (1) conduct prejudicial to the impartial and effective administration of justice which brings the magisterial office in disrepute, (2) willful violation of section 51-39a or any canon of judicial ethics, (3) willful and persistent failure to perform his duty, (4) neglectful or incompetent performance of his duties, (5) final conviction of a felony or of a misdemeanor involving moral turpitude, (6) disbarment or suspension as an attorney-at-law, (7) willful failure to

file a financial statement or the filing of a fraudulent financial statement required under section 51-46a, or (8) temperament which adversely affects the orderly carriage of justice.

(c) In addition to removal by the governor for cause pursuant to subsection (e) of section 31-276, a compensation commissioner shall be subject, in the manner and under procedures provided in this chapter to censure, suspension or removal from office for (1) conduct prejudicial to the impartial and effective administration of his duties which brings the office of compensation commissioner in disrepute, (2) willful and persistent failure to perform his duty, (3) neglectful or incompetent performance of his duties, (4) final conviction of a felony or a misdemeanor involving moral turpitude, (5) disbarment or suspension as an attorney-at-law, or (6) temperament which adversely affects the orderly carriage of his duties.

J95-057
IN RE: Honorable
Robert C. Flanagan

Judicial Review Council
State of Connecticut
February 29, 1996

CHARGES

1. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved, in violation of Canon 1 of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes.

2. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes.

/s/ D B Caldwell
Donald B. Caldwell
Executive Director
Judicial Review Council
State of Connecticut

FILE NO.: J 95-057	:	JUDICIAL REVIEW
IN RE THE	:	COUNCIL
HONORABLE ROBERT	:	HARTFORD,
C. FLANAGAN	:	CONNECTICUT
	:	
	:	APRIL 12, 1996

ANSWER TO CHARGES DATED APRIL 4, 1996

CHARGE I

The Respondent admits between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, the Complainant, Ms. Ross, but denies the remainder of the charge.

CHARGE II

The Respondent admits between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, the Complainant, Ms. Ross, but denies the remainder of the charge.

THE RESPONDENT,

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Supreme Court, U.S.
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No. 97-154

In The
Supreme Court Of The United States

October Term, 1997

ROBERT C. FLANAGAN,
Petitioner,

v.

JUDICIAL REVIEW COUNCIL OF CONNECTICUT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1997

ROBERT C. FLANAGAN

Petitioner

v.

JUDICIAL REVIEW COUNCIL OF CONNECTICUT

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CONNECTICUT

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

COUNTERSTATEMENT OF THE CASE

On November 13, 1995, Ms. Penny Ross ("the complainant") filed a written complaint with the Connecticut Judicial Review Council ("the Council") describing a three and one-half year sexual relationship between the petitioner, a Superior Court judge, and the complainant, a court reporter assigned to his courtroom during most of that period. The complaint contained allegations of harassment and intimidation by the petitioner toward the complainant. *In Re Flanagan*, 240 Conn. 157, 161-62 (1997).[1/] On January 22, 1996, the Council notified the petitioner that it would hold a confidential probable cause hearing on February 16, 1996. The notice stated:

> The area of inquiry by the Council will be whether the conduct alleged in the complaint

---

1/ The Judicial Review Council was established pursuant to Conn. Const. Art. V, § 7, implemented by Conn. Gen. Stat. §§ 51-51g, to investigate allegations of judicial misconduct and to impose discipline where warranted.

Connecticut's legislature has directed the Council to investigate "every written complaint" brought before it. Conn. Gen. Stat. § 51-51*l*(a). By statute, the Council must notify a respondent of the complaint and provide him a copy. *Id.* The Council then conducts an investigation to determine whether probable cause exists that "conduct under section 51-51i has occurred . . ." *Id.* At the investigatory stage, a respondent has the statutory right, if he chooses, to appear and be heard, and "to offer any information which may tend to clear him of probable cause to believe he is guilty of conduct under section 51-51i . . . ." *Id.* If the Council's "preliminary investigation indicates that probable cause exists that the judge . . . is guilty of conduct under section 51-51i the council shall hold a hearing concerning the conduct or complaint . . . ." to determine whether a violation has in fact occurred and if so, to issue sanctions. Conn. Gen. Stat. § 51-51*l*(c). At the public hearing, a respondent is given a full opportunity to appear and to respond to the charges. *Id.*

> occurred, and, if it did, whether such conduct violated Canons 1, 2A, or 2B of the Code of Judicial Conduct in violation of Section 51-51i(a) of the General Statutes.

Id. at 170.

At the probable cause hearing, the petitioner voluntarily appeared with counsel, cross-examined witnesses and presented evidence. Although he was not obligated to do so, the petitioner testified and admitted that he had a long-term consensual sexual relationship with the complainant while she was assigned to his courtroom as a court reporter. *Id.* at 171.

After completing this preliminary investigation, the Council issued its charges against the petitioner, alleging that over a period of several years he had had a consensual sexual relationship with a married court employee (the complainant), and that this conduct violated Canons 1 and 2A of the Code of Judicial Conduct and § 51-51i. *Id.* Specifically, these charges read:

> Charge 1
>
> Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved, in violation of Canon 1 of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes.

Charge 2

> Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes. (Petitioner's App. 81)

The petitioner answered both charges in the same manner:

> The petitioner admits between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, the complainant, Ms. Ross, but denies the remainder of the charge. (Petitioner's App. 82)

Pursuant to Conn. Gen. Stat. § 51-51(*l*)(c), the Council thereafter held a public hearing on the charges, took evidence and heard argument. By clear and convincing evidence, the Council found the following facts.

The petitioner, a Connecticut Superior Court Judge, and the complainant, a court reporter employed by the Judicial Department, engaged in a consensual sexual relationship from March 1992, to October, 1995. For substantial periods of time during this relationship, the complainant was consistently assigned as a court reporter to the petitioner's courtroom in G.A. 6 in New Haven. On many occasions the

complainant was present in the petitioner's chambers before the opening of court, during pretrial conferences with counsel present and during recesses. *In re Flanagan*, 240 Conn. 157, 164 (1997)

The Council found that the petitioner had engaged in this conduct "wilfully," and determined that his conduct violated Canons 1 and 2A of the Code of Judicial Ethics and Conn. Gen. Stat. § 51-51(i)(2). Therefore, by a vote of 9-3, the Council found the petitioner guilty of both charges. The Council then voted to issue him a public censure. *Id.*

He appealed directly to the Connecticut Supreme Court pursuant to Conn. Gen. Stat. § 51-51r and Connecticut Practice Book § 4150. In a strongly worded opinion by Chief Justice Robert J. Callahan, a unanimous Connecticut Supreme Court affirmed the Council's decision. *In Re Flanagan*, 240 Conn. 157 (1997).

The petitioner now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

The petitioner has raised no viable federal claim, and certainly none warranting this Court's review.

The petitioner seems to raise two issues. First, he claims that the Council, and then the Connecticut Supreme Court, sanctioned him for personal conduct. Second, he argues that the Court "changed" the charges against him from an allegation of a "non-wilful" to a "wilful" violation.

I. The Council Properly Held The Petitioner's Conduct To Violate The Canons Of Judicial Ethics.

Before both the Council and the Connecticut Supreme Court, the petitioner argued that his consensual sexual relationship with the complainant could not constitute a violation of either Canon 1 or Canon 2A[2/] of the Code of Judicial Conduct, or Conn. Gen. Stat. § 51-51i(a)(2), because it was a personal relationship. In this Court he persists in his contention that the Council sanctioned him for purely personal conduct.

The Connecticut Supreme Court specifically held, however:

> this was not purely personal conduct, because it took place with a person with whom [the petitioner] had an ongoing, daily professional relationship. Indeed, as the review council's findings indicate, [the complainant] not only served as the court reporter in [the petitioner's] courtroom, but "on many occasions [she] was present in [petitioner's] chambers before the opening of court, during pretrial conferences with counsel present and during recesses," occasions when one would not

---

2/ Canon 1 of the Code of Judicial Conduct provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 2A provides: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

> normally expect that the court reporter would be present. Thus, the risk of injury to public confidence in the integrity of the judiciary is substantially heightened in this instance as opposed to a case where the affair was with a person unconnected with his daily activities as a judge of the Superior Court.

Id. at 191. (emphasis supplied) The Court was therefore justified in holding:

> We are persuaded that a judge's three and one-half year affair with a married court reporter who regularly had been assigned to his courtroom is conduct properly prohibited by canons 1 and 2A because it reasonably could lead a knowledgeable observer to question the integrity of the judiciary and to lose confidence therein.

Id. at 189. This application of the facts to state-adopted statutes and judicial canons raises no federal issue.[3/] On the contrary, setting and enforcing standards of conduct for a state's judiciary is distinctly a function of the state itself. The Connecticut Supreme Court's interpretation is thus the ultimate authority on the issues presented here.

[3/] Therefore, the petitioner's discussion about the proposed commentary to Canon 2A that the Connecticut Superior Court judges failed to enact (Petitioner's Br. 9, 13) is both immaterial and irrelevant. It is immaterial because it does not address the issue raised in this case. It is irrelevant because the action the Superior Court judges took or did not take in enacting commentary to the Code did not bind the Council, which had an independent obligation to construe the Canons and the statutes.

II. The Council Properly Found The Petitioner's Conduct "Wilful," As Charged, And The Connecticut Supreme Court Did Not Alter That Charge or Finding.

The Council specifically found that the petitioner had engaged in the consensual sexual relationship wilfully. *Id.* at 164. The petitioner did not contest this factual finding below, but claimed that the finding did not support a "wilful violation of . . . any canon of judicial ethics," in violation of Conn. Gen. Stat. § 51-51i(a)(2). In this Court he now claims that the Connecticut Supreme Court "changed the charge" on him, finding him guilty of a non-wilful violation. Of course, that is not at all what happened.

Conn. Gen. Stat. § 51-51i(a) provides that "a judge shall be subject . . . to censure, suspension or removal from office for... (2) wilful violation of section 51-39a or any canon of judicial ethics." (emphasis supplied) The Council found that the petitioner had wilfully engaged in the sexual relationship with the complainant. *Id.* Based on this wilful conduct, the Council determined that he had violated Canons 1 and 2A and § 51-51i(a)(2). *Id.*

The petitioner argued to the Court below that to find him guilty of a "wilful violation," it had to find that he knew that his alleged conduct was forbidden under the Canons and that he acted with the specific intent to violate said Canons. The Connecticut Supreme Court rejected this interpretation as a matter "of statutory construction." *Id.* at 192. Recognizing that "[w]ilful" is a word "of many meanings, its construction often influenced by its context," the Court held that in "the context of the subsection of our judicial discipline statute that codifies the canons of the Code of Judicial Ethics, the term 'wilful' cannot reasonably be read to require a

specific intent to violate the canons given the necessarily broad and flexible nature of those canons." *Id.*, quoting *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031 (1945).

In fact, to have construed "a wilful violation of any canon" to require proof that the judge actually intended his conduct to violate that Canon would render the provision ineffective. Such proof would rarely, if ever, be available. The Court would not presume, therefore, that the legislature intended such an unreasonable interpretation. *Id.*

Thus, the Court concluded "that a judge is subject to discipline for a 'wilful violation of . . . any canon of judicial ethics' as long as he or she intends to engage in the conduct for which he or she is disciplined, whether or not he or she has the specific intent to violate the canon." *Id.* at 184.[4/] The Court did not, as the petitioner suggests, announce a new charge in its decision.

In the Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968), relied on heavily by the petitioner, does not hold to the contrary. In *Ruffalo*, the Ohio Board of Commissioners on Grievances and Discipline amended its charges *after* the adjudicatory hearing had already begun,

---

[4/] It is certainly reasonable to charge all judges with constructive knowledge of the Code of Judicial Conduct. *In re Zoarski*, 227 Conn. 784, 791-92, 632 A.2d 1114 (1993). "By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect." *Cincinnati Bar Ass'n v. Heitzler*, 32 Ohio St. 214, 291 N.E.2d 477, 482 (1972). "The judge must expect to be the subject of constant public scrutiny. The judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Code of Judicial Conduct, Canon 2, Commentary.

and not during a preliminary investigation.[5/] In this case, the Council properly conducted a preliminary investigation to determine if probable cause existed that the petitioner's conduct had violated the Code or Conn. Gen. Stat. § 51-51i. Having found probable cause, the Council properly charged the petitioner and notified him of the charges, which included an allegation of a "wilful" violation of the Canons. This charge and the Council's interpretation of the "wilfulness" element remained the same throughout all of the proceedings. The Court below merely adopted it.

5/ In *Ruffalo*, the petitioner was charged with twelve counts of misconduct. At the formal hearing on the charges, after the petitioner had testified, the Board amended its charges to add a new charge based only on the petitioner's and his associate's testimony. This Court therefore concluded that the petitioner had insufficient notice of the new charge prior to the formal proceedings because the Board amended the charge after the formal hearing had begun, and relied solely on the petitioner's testimony. *In the Matter of Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 1225-27 (1968).

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JUDICIAL REVIEW COUNCIL

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(3)

No. 97-154

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In The

Supreme Court Of The United States

October Term, 1997

ROBERT C. FLANAGAN,

Petitioner,

v.

JUDICIAL REVIEW COUNCIL OF CONNECTICUT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITIONER'S REPLY TO BRIEF OF RESPONDENT
IN OPPOSITION

STATEMENT IN REPLY

The respondent misconstrues the charges and findings of the Judicial Review Council and those of the Connecticut Supreme Court. The original charges upon which Flanagan presented his defense, briefed, and orally argued were later illegally changed by the Connecticut Supreme Court. The original charges read as follows:

> 1. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to observe the high standards of conduct so that the integrity and independence of the judiciary might be preserved in violation of Canon 1 of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes. (Petition for

81).

> 2. Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes. Id.

To reiterate, C.G.S. §51-51i provides, in pertinent part:

> (a)...a judge shall be subject, in a manner and under the procedures provided in this chapter to censure for...(2) ***wilful violation of...any canon of judicial ethics.***

Therefore, the Judicial Review Council censured Judge Flanagan for a wilful violation of Canons 1 and 2A of judicial ethics in accordance with C.G.S. §51-51i(a)(2) quoted above, when it found:

> On motion made and seconded, on a vote of nine to three, the Judicial Review Council

> found the Respondent guilty as charged in Charge 1

and

> On motion made and seconded, on a vote of nine to three, the Judicial Review Council found the respondent guilty as charged in Charge 2.

Respondent's statement on page 10 of its brief in opposition simply is NOT true when it states:

> On this case, the Council properly conducted a preliminary investigation to determine if probable cause existed that the petitioner's conduct had violated the Code or Connecticut General Statutes, §51-51i. [Emphasis added].

Judge Flanagan was charged pursuant to C.G.S. §51-51i(a)(2) with a wilful violation of Canon 1 and a wilful violation of Canon 2A.

When contrasting the charges of the Judicial Review Council with the judgment of the Connecticut Supreme Court, it is evident that the Court changed the charges against Judge Flanagan because that court knew that it could not affirm the holding that Judge Flanagan wilfully violated the Canons. Instead of reversing the Judicial Review Council's finding of a wilful violation of the Canons, the Court held that a judge is subject to discipline "as long as he or

she intends to engage in the conduct...." (App. 34). The Connecticut Supreme Court violated Ruffalo when it charged Judge Flanagan with engaging in wilful conduct, rather than a wilful violation of the Canons.

Lastly, the respondent misconstrues the petitioner's brief in another respect. On page 5, last paragraph, the respondent submits, "The petitioner seems to raise two issues. First, he claims that the Council and then the Connecticut Supreme Court, sanctioned him for personal conduct." That is incorrect. The Council sanctioned Judge Flanagan pursuant to C.G.S. §51-51i(a)(2) for a wilful violation of Canon 1 and a wilful violation of Canon 2A. It was after the briefs were filed and after oral argument was held that the Connecticut Supreme Court simply changed the charge and found him guilty, not of a wilful violation of the Canons, but of a wilful act. When the Connecticut Supreme Court impermissibly changed the charges as aforesaid, it violated In Re: Ruffalo, 390 U.S. 544 (1967), and the petitioner's due process rights.

CONCLUSION

The Council charged Judge Flanagan with a violation of C.G.S. §51-51i(a)(2) which requires a wilful violation of a Canon. Ruffalo, supra, was violated when the Connecticut Supreme Court charged Judge Flanagan with wilful conduct and held that engaging in wilful conduct equals a wilful violation of the Canons. The plain wording and meaning of C.G.S. §51-51i as hereinbefore quoted demands a wilful violation of the Canons and not simply a wilful act. For these reasons

and in the interest of justice, the petitioner respectfully requests this Honorable Court to grant his Petition for Certiorari.

RESPECTFULLY SUBMITTED,
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